HINDU LAW OF ADOPTION

WITH LEADING CASES

DECIDED BY THE PRIVY COUNCIL, THE SUDDER COURT AND HIGH COURTS OF CALCUTTA, BOMBAY, MADRAS, AND ALLAHABAD,

FROM 1813 TO 1889.

BY

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PREFACE.

THE subject of Adoption was not treated in my earlier work on the Hindu Law. The great request in which it has been ever since its publication and the numerous calls for a Treatise on the *Law of Adoption* have induced me to bring out this work. I have always been of opinion, and experience has confirmed it, that a work on the principles of Hindu Law, supported by Judicial Decisions, will always be appreciated as well as interesting. I have, therefore, spared no pains in collating precedents from the earliest period on record to elucidate the principles enunciated and questions upon which writers of different Schools are at variance with one another, and which are a constant source of doubt and perplexity to students of the Hindu Law. It is hoped this work will, considering the researches I have made and the labour and industry I have bestowed upon it, answer the purpose for which it is intended and prove useful to the legal profession generally.

A. C. M.

PURULIYA, CHOTA NAGPUR,

February 1890.

TO

THE HON'BLE SIR STEUART COLVIN BAYLEY,

K.C.S.I., C.I.E., C.S.,

LIEUTENANT-GOVERNOR OF BENGAL,

This Volume is Dedicated,

BY KIND PERMISSION,

AS A SLIGHT TRIBUTE OF HIGH RESPECT

BY HIS HONOR'S

HUMBLE SERVANT AND WARM ADMIRER,

THE AUTHOR.

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HINDU LAW OF ADOPTION.

THE Sanscrit sages state it to be the first duty of man to become the possessor of male offspring. There must be issue for the repose of the father's soul, as well as to perpetuate his and his ancestors' manes. "The horrors of hell (*put*), with its eternal thirst and hunger, render the possession of a son indispensable to a Hindu, and neither delicacy nor sentiment would stand in the way. The idea that the son, through his oblation of funeral cakes, would exonerate the father from debt to his progenitors and entitle him to admission to heaven, is strongly impressed upon the community."

"By a son," says Manu, "a man obtains victory over all people; by a son's son, he enjoys immortality; and by the son of that grandson, he reaches the solar abode. Without *puttra* (son), the soul of the Hindu must sink into that *put* from which it is the province of the son to deliver him through the funeral obsequies" And for the perpetuation of lineage, the Hindu sages provided twelve sorts of sons competent to offer the obsequies, cakes, and oblations of water. These are :—

Forms of Adoption.

1st. The legitimate son of the body.

2nd. The son of an appointed daughter who is equal to him, as he can offer funeral cakes for his mother's father as well as for his father, and there is no difference in the benefits conferred by a son and by a daughter's son.

The *3rd* is the son of a wife begotten (*khetraja*) by a sapinda of a husband or other person duly authorised.

The *4th* is the son of concealed birth,—one born of a married woman in her husband's house during her husband's absence. He belongs to the husband and not to his natural father, as, according to the sages, the husband being the owner of the wife, was the owner of her child as well.

The *5th* is the son of an unmarried girl.

The *6th* is a son of a woman twice married.

The other six sorts are those in whom the father acquires property by the act of others. The son given *7th* (*Dattaka*),

by the father or mother with her husband's assent as a son to a man who accepts him as a son ranks first in order, as through him the adopter rescues his ancestors. The gift is to be absolute on the part of the donor, and unqualified acceptance on the part of the donee. Should there be a condition, however, that "he shall belong to us both," he comes under the head *dwyamushyayana.*

The 8*th* is called the *Krita*, that is, bought of his father or mother or either of them for the sake of male issue.

The 9*th* is the *Kritima* or son made and adopted, being an orphan, by a man governed by the Mithila School.

The 10*th* is son self-given, that is, one, who having lost his parents, gives himself up to a man, saying: "Let me be thy son."

The 11*th* is the son of a pregnant bride and accepted while in the womb.

The 12*th* is a deserted son, who has been abandoned by his parents from inability to maintain him.

When adoption is permitted.

According to Manu, Chap. IX, verse 168, it is a condition precedent that he to whom a father or his widow on his behalf gives as his son should be at the time of adoption without issue, that is, a son, grandson or great-grandson. A great-grandson or a daughter's son does not bar an adoption, nor does the previous existence of sons who are dead. But there can be no adoption during the lifetime of a natural born son or that of an already adopted son. The Judicial Committee of the Privy Council by their decision in Rangama *v.* Atchama (4 Moore's I. A., p. 1) has set this point at rest, holding that, according to Hindu Law, a second adoption (the first adopted son) still existing and still retaining the character of a son is invalid. This dictum was followed by the Bombay High Court in Lakshmappa *v.* Ramava (12 Bom., 364), and the Calcutta High Court in Gopee Lall *v.* Chandrabolee Bahujee (11 B. L. R., 391, and 19 W. R., 12), and on appeal was approved by the Privy Council (Supl. Vol. L. R., I. A., 131). A man however can adopt as many times as he likes, if, at the time of each successive adoption, he is without issue, but he is precluded from adopting during the lifetime either of a natural born son, or an adopted son, as well as from making two or more simultaneous adoptions. In Gaynendra Chunder Lahiri *v.* Kalapahar Haji (I. L. R., 9 Cal., 50, and 11 C. L. R., 297) the Calcutta High Court held (the Privy Council after very careful consideration

on appeal approved) that the adoption of two is not valid according to Hindu Law, and where such a thing is attempted, neither of the children is the legally adopted son of the adopter.

Adoptions by blind, &c., are valid to the extent of their self-acquired property.

Adoptions by persons who are blind, impotent, leper, and disqualified from inheriting by any personal disability are valid to the extent of the self-acquired or separate property of the adopters. But no adoption can take place in the case of a leper, where the disease is such as to be inexpiable and in other cases, until he has performed the necessary expiation. Acting upon these principles the Calcutta High Court, in the case of Sayama Lall Dutt *v.* Sowdamini Dasi (5 B. L. R., 362), held that a Hindu widow, who has become unchaste, is living in concubinage, and is in a state of pregnancy resulting from such concubinage, is incompetent to take part in any religious ceremony, and to receive a son in adoption. The unchastity, however, of a widow following an adoption does not render it inoperative.—Keshub Ramkrisna *v.* Sahu Sing (I. L. R., 9 Bom., 194). Similarly in Mathura Naikin *v.* Esu Naikin (4 Bom., 545)—who were dancing-girls—the Bombay High Court held, that adoptions by dancing-girls could not be recognised by Courts of Law, and conferred no rights on the person adopted; for an adoption by a woman presupposes a husband, to whom she adopts as a representative; and a dancing-girl, while she remains a dancing-girl, can have no husband. In Madras, however, the case is otherwise, as there prevails a custom to adopt girls to follow their adoptive mothers' professions and the adopted girl to succeed to their property—*Vide* Venkatachellum *v.* Venkata Swamy (Decisions of the Madras Sudder Court of 1856, p. 65).

In Ramalinga Pillai *v.* Sadasiva Pillai (9 Moore's I. A., 506), the Privy Council held that adoption made when adopter is under pollution, in consequence of the death of a relative, is invalid. Adoptions by bachelors and widowers are valid.

Adoptions by bachelors and widowers not prohibited.

In Chandvaseekharydu *v.* Brahmana (4 Mad., 270) and Nagappa Udapa *v.* Suba Sastry (2 Mad., 367 it is held that the Hindu Law does not prohibit an adoption by a man who has not been married or by a widower. It was urged that such a person did not come within the category of Grihasta, and the right of adoption was only allowed where the legitimate mode of procreation had

failed. But the authorities in support of the dictum are such eminent personages as Jagannatha and Mr. Colebrooke (*vide* his Digest, vol. 3, p. 252), and Mr. Macnaghten (*vide* his Works, vols. 1 and 2, pp. 66 and 175). Even an adoption effected during the pregnancy of the adopter's wife, was held to be vaild—*Vide* Naga Bhoshanum *v.* Sesnamma Garu (I. L. R, 3 Mad., 180). The contention was that "it was the essence of the power to adopt that the party adopting should be hopeless of having issue." The Court, after a full consideration of the question, held, "that the contention of some would preclude a man ever adopting until extreme old age, or until he was on his death-bed, and the logical result of such a rule would be to suspend an adoption during the pregnancy not only of the adopter's wife, but also of the wives of his sons and grandsons, since the existence of issue, in the most extended sense of the word, is a bar to an adoption." Another effect would be that it would render the rules which provide for the case of a son born after an adoption quite nugatory.

Minors who have attained the age of discretion are competent to adopt. In Rajendra Narain Lahiri *v.* Saroda Sundaree Debia (15 W. R., 548), Mr. Justice Mitter observed: "Every act done by a minor is not necessarily null and void. Those acts only which are prejudicial to his interest can be questioned and avoided by him after he reaches his majority. But no such prejudicial character can be predicated of adoption in the case of a childless Hindu, and as, under the Hindu Shastras, a minor who has arrived at the age of discretion is not only competent but bound to perform the religious ceremonies prescribed for his salvation, we cannot hold the adoption made in this case to be invalid, merely because the adoptive father was in the eye of the law a minor." The Lords of the Privy Council in Jamuna Dassee *v.* Bama Sundari Dassya (I. L. R., 1 Cal., 289) held that the age of fifteen is to be regarded as the age of discretion according to Hindu Law prevalent in Bengal. They observed: "The foundation upon which marriages between infants, which so many philosophical Hindus consider one of the most objectionable of their customs, are supported, is the religious obligation which is supposed to be upon parents of providing for their daughter, so soon as she is *matura viro*, a husband capable of procreating children; the custom being that when that period arrives, the infant wife permanently quits her

Minors of the age of discretion can adopt.

The Privy Council holds 15 years to be the age of discretion.

father's house, to which she had returned after the celebration of the marriage ceremony, for that of her husband. Therefore it is to be expected, both for physical and moral reasons, that marriages should be arranged so that the husband, when called upon to receive his wife for permanent cohabitation, should have attained the full age of adolescence, and also the age which the law fixes as that of discretion. Their Lordships, therefore, upon the evidence, have no difficulty in coming to the conclusion that the adopter was, at the time of his death, of the age of 15 or 16, and, therefore, of an age which, according to the law prevalent in Bengal, is to be regarded as the age of discretion." The further question that, although a person might be of the age of discretion according to Hindu Law as prevailing in Bengal, he was still a minor under sec. 2 of Reg. XXVI of 1793, and he could not make an adoption under sec. 32 of Reg. X of 1793, without the consent of his guardian, was disposed of. Their Lordships observed that the words of the 33rd section of Reg. X of 1793 would seem to confine its operation to persons who are under the guardianship of the Court of Wards. And we have the judgment of Mitter J. to the effect that, where a minor is not under the Court of Wards, but has attained years of discretion according to the Hindu Law, he is capable of making an adoption.

Husband can adopt without wife's consent, but the wife cannot.

Adoptions are made solely to the husband, and for his benefit, and the husband can adopt without his wife's consent and despite her dissent. A wife cannot adopt to herself nor to her husband during his lifetime without his consent—*Vide* Chowdry Pudam Koery *v.* Koer, Oodey (13 Moore's I.A., 353, 2 W.R., 1). Even after his death, his assent is indispensable according to the text of Vasistha: "Nor let a woman give or accept a son unless with the assent of her lord." According to the Bengal School, the text is interpreted as saying permission given by the husband in his lifetime, and to have effect after his death. In this view the Benares School agrees. The other schools, *viz.*, the Mahratta and the Mithila, hold that the text refers to adoptions made in the husband's lifetime, and does not restrict the widow's power to adopt, since its exercise is beneficial to the husband's soul. The Mithila School goes a step farther in holding that the assent of the husband must be given at the time of the adoption, and, unless so given, there can be no adoption, and thus, according to this school,

there can be no adoption at all by a widow according to the Dattaka form. The form prevalent in Mithila is called the Kritima, which needs no consent on the part of the husband. In Collector of Madura *v.* Mootoo Ramalinga (12 Moore's I. A., 435, and 1 B. L. R., 1, and 10 W. R., 17) the Privy Council, in an elaborate judgment, came to the conclusion that by Hindu Law current in Southern India and among followers of Mitakshara in Benares, a widow can adopt a son to her husband without his express authority if duly authorised by his kindred. Their Lordships referred to Mr. Colebrooke's note on the Mitakshara, chap. I, sec. II, art. 9,—1*st*, "that the widow's power to receive a son in adoption subject to some conditions is now admitted by all the schools of Hindu Law except that of Mithila; 2*nd*, that the Bengal or Gouri School insists that the widow must have the formal permission of her husband in his lifetime; 3*rd*, that some at least of the other schools admit the adoption to be valid if made with the assent of her husband's kindred." The two first propositions are admitted, but it has been argued for the appellants that, on the true construction of this note, Mr. Colebrooke's authority for the last proposition is limited to the Mahratta School, in which the treatise, called the Mayukha, is the predominant authority. Balaambhatta, however—whom he cites as an authority for a power of adoption in the widow wider even than that expressed in the three propositions—was a commentator of the Benares School. And the several notes of Mr. Colebrooke, at pp. 91, 96, and 118 of the 2nd volume of Strange's Hindu Law, seem to their Lordships to shew conclusively that he considered the doctrine embodied in the third proposition to be common "to the followers of the Mitakshara in the Benares as well as in the Mahratta School."

Privy Council's opinion on the power of the widow to adopt.

Reference was made to Sir T. Strange's Hindu Law, vol. I, p. 79, wherein it is said: "Equally loose is the reason alleged against adoption by a widow, since the assent of the husband may be given to take effect like a will after his death; and, according to the doctrine of the Benares and Mahratta Schools prevailing in the Peninsula, it may be supplied by that of his kindred, her natural guardians; but it is otherwise by the law that governs the Bengal Provinces."

Relying upon these authorities, their Lordships observed: "The remoter sources of the Hindu Law are common

to all the different schools. The process by which those schools have been developed seems to have been of this kind: Works universally or very generally received become the subject of subsequent commentaries. The commentator puts his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India, schools with conflicting doctrines arose. Thus the Mitakshara—which is universally accepted by all the schools, except that of Bengal, as of the highest authority, and which in Bengal is received also as of high authority, yielding only to the Dyabhaga in those points where they differ—was a commentary on the Institutes of Yajnavalkya; and the Dayabhaga—which, wherever it differs from the Mitakshara, prevails in Bengal and is the foundation of the principal divergences between that and the other schools—equally admits and relies on the authority of Yajnavalkya. In like manner, there are glossaries and commentaries upon the Mitakshara which are received by some of the schools that acknowledge the supreme authority of that treatise, but are not received by all. The very point of the widow's right to adopt is an instance of the process in question, and, upon a careful review of all the authorities, it appears that the difference relates rather to what shall be taken to constitute evidence of authority from the husband than to the authority to adopt being independent of the husband."

From the foregoing observations the following conclusions are deducible :—

Consent how necessary according to the different schools.

First, that in the case of an adoption in Bengal and Benares, the husband's assent is required; in Mithila no consent is sufficient; and, according to the Mahratta School no consent is required. In Southern India the consent either of the husband or of the sapindas is sufficient.

Dattaka and Kritrima forms only are now prevalent.

At the present day only the legitimate son and the son given are recognised as sons, *viz.*, the Aurasa, *i.e.*, born of a wife of equal class, legally married; and Dattaka, *i.e.*, given, to which is to be added the later form of Kritrima or son made current in Mithila. All other forms are not in vogue; for, according to Vrihaspati, "sons of many descriptions, who were made by ancient saints in the Kali Age, cannot now be adopted by men by reason of their deficiency of power"—Dattaka Chandrika, sec. I, verse 9. And, in accordance with this text, in Bashetiappa Bin Baslingappa *v.* Shivlingappa Bin Balliappa (10 Bom., 268),

the Bombay High Court held that an adoption of a son self-given, although he may at the time of the gift be an adult, is, in the present age (the Kali Yuga), invalid. In Eshankishore Acharyya Chowdry *v.* Hurrish Chunder Chowdry (13 B. L. R., Ap., 42, and 21 W. R., 381), the Calcutta High Court held an adoption of a son, after payment of price, is not recognised in the present (the Kali Yuga), and a contract to give a son in adoption, in consideration of an annual allowance to the natural parents, is void under sec. 23 of Act IX of 1872, inasmuch as the contract, if carried out, would involve an injury to the person and property of the adopted son, and would defeat the provisions of the Hindu Law. The High Court observed: "In former days, before the present Kali Yuga, there were twelve descriptions of sons, and the eighth description, we find in the Hindu Law, was the son adopted after payment of price. Such an adoption, namely, after payment of price, is not recognised in the present Yuga (the Kali Yuga); the only adoption now recognised being that of Dattaka son or son given, who alone can take the place of the Aurasa son or son of the loins. The son given, that is, the Dattaka son, is defined in the Dattaka Chandrika, sec. 1, para. 12: "He is called a son given whom his father or mother affectionately gives as a son being alike,"—alike being explained to mean of the same class. Now, it could not be said if this contract were carried out that the boy has been affectionately given; a gift, of course, implies an act without consideration." The Dattaka and the Kritrima forms are thus the only forms prevalent at the present day, and are the only means by which a Hindu can be delivered from *put*, or attain the particular heaven referred to by Nanda Pandita; or by which he can preserve and continue his name and lineage. With regard to the ritual of adoption Vasistha has it: "He who means to adopt a son must assemble his kinsmen, give humble notice to the king, and there and then having made an oblation to fire with words from the Veda, in the midst of his dwelling-house, he may receive as his son by adoption a boy nearly alike to him, or, on failure of such, one remotely allied." The ceremonies enjoined in the Dattaka Mimensa and Dattaka Chandrika, as described in the Vyavastha Darpana, are as follows:—

Ceremonies for adoption.

The adopter having fasted on the day previous to that of adoption, and on the following day having performed

the daily religious duties and put on two rings wrought in *kusa* (grass), performed the *achaman* (act of washing the mouth), invoked Vishnu (the preserver of the universe) by uttering his name, worshipped Narayana (the god who existed before all worlds) with perfume and flowers, and uttered the word *swasti* (good attend you), shall three times repeat, in the hearing of the persons attending the ceremony, these words: "Say ye (this is) an auspicious day for this act of adopting a son to be performed. Then the adopter is to utter *swasti and redhi*, and repeat *swasti va India*, and undertake the Sankalpa, which is as follows:—" To-day of such and such a month and lunar date, I, Son of (name) such and such a gotra by reason of being without issue (male) as well as to propitiate Almighty God by liquidating the debts due to ancestors and being delivered from the hell called *put*, and also to continue my own lineage, I will receive a son in adoption according to the ordinances of the holy sages—Manu, Vrihaspati, Vasistha, Shounaka, Parasara and the rest, and according to the branch of the Veda which I follow.

"*Next*, the Brahmana, constituted as Acharyya, having purified the altar with 5 *garyas* (milk, curds, ghee, cow-dung and the urine of a cow) removed the impediments and purified himself, shall properly place the *ghatas* (earthen mugs) full of water, and, according to his ability, worshipped Ganesha (son of Siva and Durga, the god of wisdom and remover of obstacles) and the rest, the Planets and Dekpalas (the gods who superintend the quarters of the universe), Prajapati and Vishnu, and having placed the consecrated fire and made the *charu* (rice boiled in milk and clarified butter) according to the branch of the Veda, he shall place the latter at his left side.

"After that the adopter inviting his friends and relatives, representing to the sovereign, and going before the giver in the assembly shall ask thus: 'Give the son?' The giver having repeated the *mantras* (incantations) shall say: 'I give.' And the adopter repeating the *mantra*, 'Devasyatwa,' shall hold him by both hands and say: 'I receive (adopt) thee for religious duty; I receive thee for progeny: sprung from the several limbs, especially from the breast, thou, my soul, art called son, mayest thou live for a hundred years, belonging to a different gotra, do thou be good to me, and to thyself.' Next, he shall smell the head of the child and adorning him with apparel, ear-rings, &c., &c.,

he shall deliver him up to his wife, if he have one. Then the adopter will place him before the Acharyya, who, with the *charu* already prepared and kept, shall offer a hundred *homas* (oblations to fire) to Prajapati, and then perform the Maha, Vyahriti-homa, and the homa to the creator of the universe, the homa to Vishnu, and the Telajya homa to the deities worshipped. Then the act of adoption is over ; and is concluded with the singing called 'Vamadevya.'"

The *telaka* (a mark on the forehead) made with the ash attached to *sruva* (ash rake), and the act of giving remuneration (*dakshina*) shall be performed.

According to Jagannatha, the inadvertent omission of a ceremony would not invalidate adoption, and the sacrifice, to fire, with holy words from the Veda, *viz.*, the Putresti, Jag, is absolutely necessary in the case of Brahmins, as, indeed, the three superior castes—*Vide* Luchman Lall *v.* Mohun Lall (16 W. R., 179).

Gift and acceptance only are necessary for Sudras.

The Sudras perform an imitation of it with texts from the Puranas. All that is required of the Sudras is gift and acceptance manifested by some overt act. But when a Brahman boy is to be adopted, the adopter should invite the relatives of either party, and entertain them at his house giving notice to the king or principal authority of the place of his intention, and then the husband and wife waiting upon the parents of the boy and stating that they have no son of their own should ascertain if they are willing to give them one of theirs, to which they assenting, the Dattaka homam must be performed. The same ceremonies, with the exception of homams, are to be performed in the other castes, and the water called *mangenum* should be drunk in the presence of relatives. Sudras cannot perform Dattaka homams as they cannot use the texts of the Vedas in their religious ceremonies, and can, at the most, perform an imitation of it with texts from the Puranas.

In the Mithila district a form of adoption, called the Kritrima, prevails. It is included in the modern rule which does not recognise any sons except the legitimate son and the son given (Dattaka). The Kritrima son, according to Manu, is a son made or adopted whom a man takes as his own son, the boy being equal in class, endued with filial virtues, acquainted with the merit of performing obsequies to his adopter and with the sin of omitting them, and being, according to the Mitakshara, enticed by

the show of money or land, and being an orphan, without father or mother; for if they be living, he is subject to their control.

No ceremonies nor any of the rites necessary in other adoptions need be performed, but the consent of the adopter is indispensable. Mr. Justice Dwarkanath Mitra held this to be essential in Luchman Lall *v.* Mohun Lall (16 W. R., 179).

Distinction between Kritrima and Dattaka forms.

Such being the case, the adopter must needs be an adult, and thus there is no limit of age. The chief distinctions between this form and the Dattaka are that there is no change of gotra by the former, as "a Kritrima son does not lose his claim to his own family nor assume the surname of his adoptive father; he merely performs obsequies and takes the inheritance." Besides there is no restriction on choice or to adopt an only or an eldest son. The Kritrima son loses no rights of inheritance to his natural family, and although in Mithila a woman cannot adopt to her husband after his death, whether she has obtained his permission or not, she is at liberty to adopt a son to herself either during her husband's life or after his death. And the son adopted by her, becomes heir to her estate, offers to her funeral oblation, and is, with respect to her, her son, and not that of her husband as well. In the Collector of Tirhoot *v.* Hurro Persad Mohunt (7 W. R., 500), it is laid down that, according to Hindu Law current in Mithila, a widow has power to adopt a son in the Kritrima form, with or without her husband's consent; but such son would not, by virtue of such adoption, lose his position in his own family, nor would he succeed to the property left by the husband of his adoptive mother, but would be considered her son and entitled to succeed to her property only. In Mussamut Shibo Koeree *v.* Joogun Singh (8 W. R., 155), it was held that a widow in the Mithila province is capable of adopting in the Kritrima form without her husband's consent. He does not become a member of the adopting family, but he (and after him his issue) continues to be considered a member of his natural family, and takes the inheritance, both of his own family and of his adopting mother or his adopting father. He has no rights of collateral heirship in the family or of his adoptive parent. The relation of Kritrima for the purpose of inheritance extends to the contracting parties only. He is necessarily the son of two

fathers, but he does not prolong the line of his adopter nor does he take his name. "For a husband and wife may jointly adopt a son, or each may adopt separately. If a woman appoint an adopted son, he stands in the relation to her of a son, but he does not become the adopted son of her husband nor offer to him funeral oblations nor succeed to his property. If a husband and wife jointly appoint an adopted son, he stands in the relation of son to both, and is heir to the estate of both. If the husband appoint one and the wife another adopted son, they stand in the relation of sons to each of them respectively, and do not perform the ceremony of offering funeral oblations, nor succeed to the estate of the husband and wife jointly."

In respect of ceremonies there is difference as well. In the Kritrima adoption no ceremonies are observed beyond that at an auspicious time, the adopter of a son having bathed, addresses the person to be adopted, who has also bathed, and to whom he has given some acceptable chattel, and says: "Be my son?" He replies: "I am become thy son."

Ceremonies necessary according to Dattaka form.

In the Dattaka adoption, according to Jaganatha, "the adopter is to give humble notice to the king, and, after making an oblation to fire with holy words from the Veda, give gold and winter corn in conformity with usage, ascertain his name, family, and class in the presence of kinsmen, and then receive a boy for whom the ceremony of tonsure and the like has not been performed, whose age does not exceed five years, and who is given by his father or by his mother with the assent of her husband, provided that they have another son." By this act the son is transferred from the gotra of his natural father to that of his adoptive father. The transfer is effected by the natural father with the utmost publicity, seating the boy on the thigh of the adoptive father, who accepts him with prayers and holy texts, declaring his acceptance of the child, and performing the rite of Dattaka homam.

The performance of Dattaka homam is indispensable when the adoption is from another gotra: if it is not performed, the adoptive son is called *amitya datta, i.e.*, not finally and completely dissevered from his natural family.

The *nitya datta* is performed with homams or offerings before fire, and the son must be invested with the Brahmi-

nical thread in the gotra of his father's adoption. In the *amitya datta* it may be performed in either his natural or his adoptive father's family. All this has reference to Brahmins alone, as they only can perform the Dattaka homam, and if, by any mischance, the child being dissevered from his own family at the same time is not perfectly inducted into the family of the adopter, his status is that of slavery in the new family—*Vide* Dattaka Mimansa, chap. iv, verse 40. "Should the ceremony of tonsure and the rest not be performed (by the adopter), or should one be adopted on whom the ceremony of tonsure and other rites have been performed, a servile state ensues not that of son."

The anxiety to have children, no doubt, afforded great facility to adopt, since, by Hindu Law, no written acknowledgments nor agreements, nor even the performance of religious ceremonies are necessary to the validity of adoptions, but as Lord Wynford observed in Satrugan Sutputty *v.* Sabitra Dye (5 W. R., P. C., 108), it led on the other hand to fabricated adoptions. "It is to be lamented," he observed: "That an irrevocable act, which defeats the just expectations of the relations of deceased persons, may, at any distance of time after it is supposed to have been done, be proved by verbal testimony. It would contribute much to the security of property and the happiness of Hindu families; if in a country where the religious obligation of an oath is unfortunately so little felt and documents so readily fabricated, adoptions and all other important acts were required to be performed in the presence of some Magistrate and to be recorded in some Court. . . . . I would say that in no case the rights of wives and daughters should be transferred to strangers, or to more remote relatives, unless the fact of adoption, by which this transfer is effected, be proved by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth." The dictum accordingly is that, although the Hindu Law does not require that adoptions should be acknowledged in writing, it is usual when persons, in the situation of a zemindar, adopt sons, to acknowledge such adoptions in writing, to give notice to the ruling power, and to invite the neighbouring zemindars and others to be present at such an adoption, for the purpose of securing publicity and preventing imposition.

Practice of written acknowledgments recommended.

The subject, however, of ceremonies enjoined to be observed by the Hindu Law and the status conferred on adopted sons are very important and should be treated rather diffusively in the following chapter—*viz.*, The Contract of Adoption.

THE CONTRACT OF ADOPTION.

According to the Dattaka form, adoption is a contract between parents who give and take the child. Manu merely lays down that there must be gift and acceptance evidenced by the pouring of water. Jaganatha, in Colebrooke's Digest, Book 5, chap. IV, sec. viii, verse 273, is quoted as laying down that homam is an unessential part of adoption, which is the object of the will and is valid without oblation to fire. Acting upon these opinions the Calcutta and Madras High Courts in Alank Manjari *v.* Fakir Chand Sircar (5 S. D. R., 356) and Singamma *v.* Vingamari Venkatacharalu (4 Mad., 165) held, that legally nothing, but the consent of the parties, is necessary, and the adopter should be without male issue at the time, and the child to be received should be within the legal age, and must not be either an only son or the eldest son of the giver. The ceremony of Dattaka homam is essential only in the case of Brahmins, and that only in a spiritual point of view, and not because it is enjoined as essential to the protection of the rite for civil purposes.

Essentials to Dattaka adoption.

These opinions, however, were dissented from in subsequent rulings by both the Calcutta and Madras High Courts. In Nittyanund Ghose *v.* Kessan Dyal Ghose (7 B. L. R., 1), Bayley and Paul, J.J., held that ceremonies, beyond the giving and taking, are necessary to be observed for a valid adoption among Hindus of the superior classes. And in Venkata *v.* Subbadra (I. L. R., 7 Mad., 548), Turner, C.J., and Muthasammi Aiyer, J., observed that " although it was held in this presidency that Dattaka homam is not of the essence of adoption—Singamana *v.* Ramanujacharlu (4 Mad. H. C. Rep., 165)—we are inclined to think that it is essential among Brahmins and to agree with the Calcutta High Court in this respect. . . . . Viewing adoption barely as a civil transaction, gift, and acceptance from and by persons com-

petent to give and take would make it complete, if the adopted boy were transferred from one family to the other. In the view that Dattaka homam is essential among Brahmins, the civil transaction is not perfect, unless it is invested with the character of a religious rite. But from the very nature of the thing, the agreement to give and take must precede the religious rite, and the interval of time between the two is immaterial. The gift is an act ancillary to perfection by a religious rite.

Among Sudras, no ceremonies in addition to the giving and taking of the child are necessary according to the Full Bench ruling of the Calcutta High Court, and affirmed in appeal by the Privy Council in Indramoni Chowdrani *v.* Behari Laul Mullick (I. L. R., 5 Cal., 770, 6 C. L. R., 183, and L. R., 7 I. A., 24) over-ruling Bhairubnath Sye *v.* Mohesh Chunder Bhadury (13 W. R., 168, and 4 B. L. R., A. C., 162).

The Privy Council observed : " The question to be considered is the correctness of the finding of the High Court to the effect that amongst Sudras in Bengal, no ceremonies are necessary in addition to the giving and taking the child in adoption. The strongest argument against this proposition is, of course, founded in the 56th sloka of the 5th section of the Dattaka Mimansa, which says : " It is therefore established that the filial relation of adopted sons is occasioned only by the proper ceremonies of gift, acceptance and burnt sacrifice, and so forth ; should either be wanting, the filial relation even fails." It is admitted that whatever may be the force of the words " so forth" in the case of Brahmins or members of the other superior classes, the only religious ceremony that is essential to an adoption by a Sudra is the Dattaka homam or burnt sacrifice, which it is said he, though as incompetent to perform for himself as he is to repeat the prescribed texts of the Vedas, may perform by the intervention of a Brahmin priest. The authorities, however, which have been with great candour fully cited by Mr. Cowie, show that it has long been questioned whether even the performance of Dattaka homam was essential to a valid adoption, at all events in the case of Sudras. Jaganatha lays down (3 Digest, 244) this broad proposition : " The oblation to fire with holy words from the Veda is an unessential part of the ceremony ; even though it be defective, the adoption nevertheless is invalid, and, in arguing in support of this pro-

position, he seems to make no distinction between Sudras and the superior castes. In the case before the Privy Council (2 Knapp, 287)—which it appears was a case between Brahmins—it was held written acknowledgments nor the performance of any religious ceremonial are essential to the validity of adoptions ; such acknowledgments are usually given and such ceremonies observed, and notice given of the time when adoptions are to take place in all families of distinction as those of zemindars or opulent Brahmins; that wherever these have been omitted it behoves the Court to regard with extreme suspicion the proof offered in support of an adoption." This statement of the law is perhaps of more value than it would otherwise have been, when it is considered that the case was argued on one side by Mr. Serjeant Spankie, who had great experience in India, and probably was better acquainted, than English Counsel at that period generally were, with questions of Hindu usage and law. It cannot, however, be considered as more than a dictum, since the decision was against the adoption as a fact. It was nevertheless in accordance with the law as then laid down by Sir Thomas Strange at pages 83 and 84 of the first volume of his Treatise, 1st edition, and the authorities cited by him. Then it has been more recently decided in the Madras High Court (4 Mad. H. C. Rep., 165) that even in the case of an adoption by a Brahmini woman the ceremony is not necessary. Their Lordships intend to follow the example of the High Court in this case in not considering to what extent the Madras decision is correct, and how far the ceremonies may be omitted in the case of adoption by a Brahmini woman. They may, however, observe that the reasoning of the Madras decision applies even *à fortiori* to Sudras. The other Indian decisions which have been cited, and particularly those of the late Sudder Dewany Adalut, clearly show that the present question has long been treated as an open and vexed one by Pundits as well as Judges. It was so treated in a case before their Lordships in 1872, in Naryan Mitter *v.* Krishna Sundari Dasi (11 B. L. R., 171), but was not then decided, the suit being dismissed upon another ground. Lastly, the Full Bench in this case appears to have satisfied itself that the passage in the Dattaka Nirnaya, upon which the Vyavastha Darpana relies as an answer to those who deny that the performance of the Dattaka homam is essential to an adop-

Privy Council lays down Dattaka homam not necessary in the case of Sudras, but merely giving and acceptance.

tion by a Sudra, is in fact an authority the other way. Upon the whole, their Lordships have come to the conclusion that the weight of authority is in favour of the finding of the Full Bench of the High Court.

Brahmins cannot adopt a sister's son.

In the case of Raj Kumar Lall *v.* Bisessor Doyal (I. L. R., 10 Cal., 693), the question, whether a Kayastha is entitled to rank amongst the three superior classes, was determined. In it, it was held, *inter alia*, that a member of any of the three superior classes—Brahmins, Khetrias and Vaisyas—cannot, according to Hindu Law, adopt a sister's son; and a double adoption, *i.e*, adoption by two persons, is invalid.

As to the question whether Kayasthas are entitled to rank amongst the three superior classes, the learned Judges (McDonell and Field, JJ.) observed: "A vast mass of authorities has been quoted to us during the hearing of this appeal. Considerable research and ingenuity of argument have been displayed in discovering authorities and placing them before us. The following amongst other authorities were referred to: Padma, Purana, Yajnavalkya, Mr. Mandlik's Work on Hindu Law, Mitakshara, Viramitradya, Wilson's Glossary, Wardon's Hindu Law, Steel on Castes, Vivada Chintamoni, Sherring on Castes, Elliot's Races of British India, the Gazetteers of the North-Western Provinces and Oudh, Professor Jolly's Institutes of Narada, Max Müller's Sacred Books of the East, and the Dattaka Mimansa. Many of the arguments addressed to us rested upon the somewhat doubtful legends of Hindu mythology, and although no doubt very ingenious, were not, however, based upon modern facts proved or undisputed; or characterised by that conclusive force which are necessary in order to have weight with a Court of Justice in this practical age. We think that the whole question has been fairly summed up in the following passage of the Vyavastha Darpana:—

"'There is, therefore, a preponderance of authority to evince that the Kayasthas, whether of Bengal or of any other country, were Khetrias. But since several centuries passed, the Kayasthas (at least those of Bengal), having been degenerated and degraded to Sudradom, not only by using after their proper names the surname of 'Dasa,' peculiar to the Sudras, and giving up their own which is 'Barnia,' but principally by omitting to perform the regenerating ceremony *Upanyana* hallowed by the Gayatri.'

"It has been contended that, however valuable the Vyavastha Darpana's opinion may be as regards Bengal Proper, there is a difference as regards Behar and the Kayasthas of Behar. It had been established by evidence to our satisfaction that there was a difference in respect of the questions essential to this enquiry, and that the Kayasthas of Behar, as a class, had generally performed those ceremonies which might be supposed to have the effect of retaining them in the ranks of the three upper classes, we might accept this evidence and might come to a different conclusion from that to which we feel constrained upon the authorities and the evidence. We shall, therefore, consider that the evidence which has been placed before us to show that the Kayasthas of Behar are an exception to the general principle contained in the opinion which I have just extracted from the Vyavastha Darpana. *First*, there is a Vyavastha by ninety-six Pundits of Benares. Two of these Pundits were examined as witnesses in the case; and we are of opinion that the value which can be attached to the Vyavastha, must be measured exactly by the value which can be given to the oral testimony of these two witnesses. The Vyavastha is a recent one, and there is no provision of law which allows a Court of Justice to accept as evidence a written opinion delivered by persons still alive who have not been called to the witness-box. Then, as regards the testimony of the two Pundits who were examined (and this is, perhaps, the most valuable part of the oral testimony), we have to observe that these gentlemen do not speak with direct reference to Behar, and, however valuable their opinion may be, if precise upon the point, with reference to Kayasthas of the Upper Provinces, or Benares, we think they cannot be accepted as an authority upon the subject as regards the Kayasts of Behar.

"The next piece of evidence consists of the decisions of the lower Courts. Two cases have only been quoted. We think that these judicial instances are too few in number to establish an usage or custom such as is contended for. Were it otherwise, we think that in a matter of this sort very little weight can be given to the decision of the Subordinate Civil Courts.

"Then we have a considerable quantity of oral evidence. This evidence, with the exception of one or two witnesses, consists of the testimony of persons who are themselves Kayasts, and whose interest in the subject-matter of this

proceeding is considerable. Under the circumstances, we think that this evidence must be accepted with very considerable cantion. But when we come to examine this evidence, we think that it does not to any very material extent advance the case of the plaintiffs. The examination of the witnesses was directed principally to shew that in four particulars Kayasthas of Behar observed religious or other rules, which would have the effect of giving them a title to rank amongst the three superior classes. These four particulars are:—*first*, to carry the sacred thread; *secondly*, ability to perform the homa; *thirdly*, the rule as to the period of impurity; and, *fourthly*, the rule as to the incompetence of illegitimate sons to succeed. The practice as regards adoption has also been made the subject of argument, but as this is the very point in dispute, and as the instances supposed to have been established by evidence are exceedingly few, we get but little value upon this portion of the evidence. We have considered the evidence with respect to the four particulars just mentioned, and the impression which it creates on our minds is that no such uniformity has been established as amounts to legal proof of the custom or usage contended for. Some of the witnesses state as a fact that the sacred thread was not usually worn. As regards the period of impurity observed, there is a remarkable diversity in the practice of different persons. Taking the whole evidence together, we think it fails to establish that the Kayasthas of Behar as a class have observed the four rules relied upon so uniformly and so regularly that they are entitled to say that upon the basis of these observances they must rank among the three superior classes. It must be borne in mind that what has been sought to be proved in this case, is not an usage in a particular family, but the custom of a class, that is the whole class of Behar Kayasthas, and regarding this custom, as the point to be proved, we think that the evidence fails to establish it.

Sudras can adopt sister's son. Kayasthas are Sudras.

"The conclusion then to which we are led upon the authorities and upon the evidence which has been submitted to us is this, that the plaintiffs have not shewn that the Kayasthas of Behar rank amongst the three superior classes, and that, therefore, the adoption of a sister's son is invalid. This decision renders three points quite clear, *viz.*,—Sudras can adopt sister's sons; that Kayasts are Sudras; and double adoptions, that is, adoption by two

persons, although members of the same family, of a child, are invalid."

The text of Vriddha Gautama is: "In the three superior tribes a sister's son is nowhere mentioned as a son." This is according to sloka 20, Dattaka Mimansa, which lays down that "no one can be adopted whose mother the adopter could not have legally married." The prohibition is contained as well in the Samskara Kaushibha, the Dharma Sindhu, and the Dattaka Nirnaya. Narada states that a sister's son and a daughter's son may be adopted by Sudras but not by members of the three higher classes. Verse 2, slokas 32, 74 and 107, and verse 1, slokas 7 and 17 forbid the adoption by one of the regenerate classes of a "daughter's son, a sister's son, and the son of the mother's sister." The adoption of a brother, a step-brother, or an uncle, whether paternal or maternal, the son of a daughter, or of a sister, or of an aunt, is unlawful—*See* Dattaka Mimansa, sloka 17, and Ramalinga *v.* Sadasiva (9 Moore's I.A., 506), and Kora Shunko *v.* Beebee Munnie (2 Morley's Digest, 32). These rules apply to the adopter even if he were by adoption removed from his natural family, as adoption does not cease to operate as a bar to prevent intermarriage within the prohibited degrees. A man cannot lawfully marry his brother's or nephew's wife, but a brother's son and a grand-nephew's wife's brother, or his son, and the son of a wife's sister are proper persons to be adopted—*Vide* Morun Moee *v.* Bejoy (Sutherland's Special No. F. B. Rulings, p. 122). The rules exclude only the sons of women whose original relationship to the adopter was such as to render them unfit to be wives, and especially apply to Brahmins and others of the regenerate tribe. Sudras, as has been observed, can adopt a daughter's or a sister's son, and a mother's sister's son—*Vide* Chuman Nagayya *v.* Pedda Nagayya, (1 Mad., 62).

Adoption by the regenerate classes of a daughter's, a sister's, and mother's sister's sons is invalid.

Adoptions of sons of women who could not be wives of the adopter, prohibited.

Upon the interpretation of Nanda Pandita, that a sister's son includes a brother's son, the adoption in Battas Kuar *v.* Lachman Sing (7 N.-W. P., 117), by a widow under her husband's authority of a son of her brother, was set aside. But such adoptions are fully approved in the three Presidencies of Bengal, Madras, and Bombay, as held in Sri Ramulu *v.* Ramayya (I. L. R., 3 Mad., 15), and Venkata *v.* Subbadra (I. L. R., 7 Mad., 548), and Ravee Bhoor *v.* Rup Shanker (2 Borradaile's 662 and 713), and Gakulanund Doss *v.* Wooma Daee (15 B. L. R., 405, and 23 W.-R., 340). In the

last, the principle of adoption of a brother's son was upheld, although it gave effect to the doctrine that the adoption of a stranger is valid even though near relatives, a son of a brother, was in existence at the time of the adoption. The Lords of the Privy Council, in appeal (I. L. R., 3 Cal., 587, 2 C. L. R., 51, and L. R., 5 I. A., 40), upholding the decision of the High Court, observed: "The objection to the adoption is that it was one of a very distant relation, not even within the class of Hullodhur's sapindas made in violation of the preferential right of Dinabundhoo, the only son of Jagannath, who was Hullodhur's brother, by the whole blood, to be adopted.

The plaintiff relies mainly upon certain texts of the Dattaka Mimansa and the Dattaka Chandrika, of which the former is considered by the Benares School to be the more authoritative treatise on the subject of adoption.

The texts chiefly insisted upon are the 28th, the 29th, the 30th, the 31st and the 67th slokas or paragraphs of the second section of the Dattaka Mimansa, and the 20th the 21st, the 22nd, the 27th and the 28th paragraphs of the first section of the Dattaka Chandrika.

Selection of persons for adoption is a matter of conscience and not prescription with the adopter.

It is unnecessary to set out these at length, because it may be conceded that they do in terms prescribe that a Hindu wishing to adopt a son shall adopt the son of his whole-brother, if such a person be in existence and capable of adoption, in preference to any other person; and qualify the otherwise fatal objection to the adoption of an only son of the natural father by saying that, in the case of a brother's son, he should nevertheless be adopted in preference to any other person as a dwyamashyayana or son of two fathers.

The grave question, however, that arises in this case is, whether the injunctions just referred to are merely binding upon the consciences of pious Hindus, as defining what they ought to do, or so imperative as to have the force of law, violation whereof should be held in a Court of Justice to invalidate an adoption which has otherwise been regularly made.

Before considering this question, their Lordships think it right to observe that the two propositions just stated, or, at least, the last of them, may well be qualified by the incontestable fact that Hullodhur was separate in estate from his brother Jagannath. The whole of the law supposed to affirm the necessity of adopting a brother's son seems to have

been deduced by the ancient commentators with what logical sequence it is unnecessary to consider, from a text of Manu which says :—" If one among brothers of the whole-blood be possessed of male issue, Manu pronounces that they all are fathers of the same by that son. The direct consequence of this might well be that, in an undivided family (the normal state of a Hindu family), the nephew, without further act of affiliation, would effectually perform the funeral obsequies of his uncle, whose share in the joint family property in the absence of male issue, would pass to his co-parceners by survivorship. But in the case of a separated Hindu, the right of performing his obsequies, with the consequent right of succession, is, in the absence of male issue in his widow, or, failing her, in his daughter and daughter's issue. Again, to constitute a dwyamashyayana there must be a special agreement between the two fathers to that effect; or the relation must result from some of the other circumstances indicated by Sir William Macnaghten, at page 71 of his Principles and Precedents. And he there states the consequences to be different from those of an ordinary adoption, inasmuch as the children of the adopted sons would revert to their natural family. Hence the adoptive father fails, by such an adoption, to prepetuate his own line of male succession—a circumstance which renders the consent of divided brothers to such an adoption the more improbable. In the present case there is nothing to show, and it is unreasonable to presume, that Hullodhur would have been content to receive, or Jagannath would have been willing to give, the only son of the latter in adoption. And the presence of the name of the latter on some of the documents, which describe the defendant as the adopted son of Hullodhur, is some evidence that Jagannath recognised that adoption as valid. Moreover, for aught that appears in the cause, Dinobundhoo may, at the date of the adoption, have become from age, marriage, or other like objection, incapable of being adopted by his uncle.

Reverting, however, to the general question, whether the omission to adopt a brother's son is an objection which at law invalidates an adoption otherwise regularly made and so destroys the civil status of the person so adopted, even after, as in this instance, years of recognition, their Lordships have to observe, in the first place, that they have been referred to no case in which a Court of Justice has so decided. The nearest authority of the kind is that of Ooman Dutt

v. Kunhea Sing (3 Selborne's Rep., 144). That case arose in a district governed by the Mithila law. The plaintiff claimed, under an adoption by his maternal grandfather not in the Dattaka but Kritrima form which is recognised by the Mithila law, to dispossess the nephew-and-heir of that grandfather from the share of the latter in a joint family estate. Various objections, besides the one in question, were taken to the adoption; the case, after the fashion of those days, went from one Judge of the Sudder Court to another, who consulted different pundits, and came to conflicting decisions, but ultimately the suit was dismissed. The marginal note, no doubt says: "According to the Hindu law, while a brother's son exists, the adoption of any other individual as a son, either in the Dattaka or Kritrima form of adoption, is illegal." But the force of this note is very much weakened by the fact that Sir William Macnaghten, who being the editor of the reports was probably the author of it afterwards, and with a full recollection of the case wrote the passage which will be presently cited. The decision itself was merely on an alleged adoption in the Kritrima form, which, in its inception and consequences, is very distinguishable from one in which the natural father parts with his son on the full faith that he will be effectually, and, for all purposes, received into his new family, and acquire therein the rights which he absolutely loses in his own. The son adopted in the Kritrima form retains his rights of inheritance in his original and natural family.

The general question seems to have been considered by Sir Thomas Strange, Mr. Colebrooke, and other text writers of eminence.

Sir Thomas Strange, after recapitulating the rules which ought to guide the discretion of the adopter, including the authorities on which the plaintiff relies, says: "But the result of all the authorities upon this point is that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription, rendering invalid an adoption of one not being precisely he who, upon spiritual considerations, ought to have been preferred." And by his references to the cases collected in the second volume he shows that Mr. Colebrooke and, more strongly, Mr. Ellis were of this opinion.

Again, Sir William Macnaghten, just after referring to the case of Ooman Dutt, deals with the question thus: "It

would appear, however, that according to the law of Bengal and elsewhere, where the doctrine of the Dattaka Chandrika is chiefly followed, and where the doctrine of *factum valet* exists, a brother's son may be superseded in favour of a stranger, and even in Benares and in the places where the Mimansa principally obtains, and where a prohibitory rule has in most instances the effect of law so as to invalidate an act done in contravention thereto, the adoption of a brother's son or other near relative is not essential, and the validity of an adoption actually made does not rest on the rigid observance of that rule of selection, the choice of him to be adopted being a matter of discretion. It may be held then that the injunction to adopt one's own sapinda, a brother's sons are the first, and, failing them, to adopt out of one's own gotra is not essential so as to invalidate the adoption in the event of a departure from the rule" (Principles of Hindu Law, p. 68).

It may further be observed that even Mr. Sutherland, in his Synopsis (see Stoke's Codes, p. 665), says : "But though Nanda Panditta extends this principle (*i.e.*, that proximity of kindred ought to determine the choice of an adopted son) with elaborate minuteness, it cannot be regarded as a rigid maxim of law, vitiating the adoption of a remote, when a near, kinsman, or of a stranger when a relative, may exist. The right, however, of a whole-brother's son to be adopted in preference to any other person, where no legal impediment may obtain, seems to be generally admitted and may be regarded as a received rule of law." It is not easy to see upon what grounds the distinction here taken rests. If what the Dattaka Mimansa enjoins is to be taken as imperative and having the force of law, the language of the 74th article of the second section, which deals with the duty of selection where there is no brother's son, seems to be hardly less imperative than that of the articles which affirm the preferential right of the brother's son."

Their Lordships further held in this case that the maxim *quod freri non dabuit factum valet* applies to Madras—*vide* Chinna Gaundan *v* Kumara Gaundan (1 Mad. H. C. Rep., 54).—The High Court of Bombay held so in Rajah Vyankatrarv *v.* Joyavantrarv (4 Bom. H. C. Rep. A. C., 191) and the Calcutta High Court in Rajah Opendra Lal Roy *v.* Ranee Bromomoyee (10 W. R., 347).

Doctrine of factum valet applies to cases that are voidable and not those which are *ab initio* void.

The doctrine of *factum valet*, *viz.*, the cases and the limits within which it applies, was fully propounded by Westropp, C. J., in Gopal Narhar Safraj *v.* Hanmant Ganesh Safraj, (I. L. R., 3 Bom., 293). It was held that amongst Brahmins, Khatryas and Vaishyas they are absolutely prohibited from, and incapable of, adopting a daughter's or sister's son, or son of any other woman whom they could not marry by reason of propinquity. In the case alluded to, it was urged that the maxim *factum valet* applied, but the Court held otherwise, observing : "There is no necessity for the Court to set aside that which is *ab initio* void," and the term "set aside" cannot properly be employed in such a case. The term is applicable only to that which is voidable, not to that which is null and void. In the case of Lakshmappa *v.* Ramava (12 Bom. H. C. Rep., 364) the principle on, and the extent to, which the rule *factum valet* is permitted to operate in cases of adoption are fully considered, and this Court concurs in what was said by the Division Court in that case upon that subject. It was there said, of that rule, "that its proper application must be limited to cases in which there is neither want of authority to give or to accept, nor imperative interdiction to adopt. In cases in which the Shastra is merely directory and not mandatory, or only indicates particular persons as more eligible for adoption than others, the maxim may be usefully and properly applied, if the moral precept or recommended preference be disregarded. In that case it was held that incapability, in the alleged adopted son, to be given in adoption by a widow without the previous assent or direction of her husband, *e.g.*, his being an only son at the time of the alleged adoption, would be fatal to the adoption, and could not be aided by the maxim *factum valet.*

Recently in Lallabhai Bapubhai *v.* Mankavarbai (I. L. R., 2 Bom., 388, 401, 404, 405) Mr. Justice Bayley refused to recognise as valid an adoption in which the mother of the boy gave him without the consent of her husband who was alleged to be imbecile, which allegation failed in proof, and, in the hearing of the appeal filed upon various grounds in that case, it was admitted on both sides that Mr. Justice Bayley's findings on that point were unimpeachable.

In Narayan Babaji *v.* Nana Mandhor (7 Bom. H. C. Rep., 153, A. C. J.) want of authority in the adoptive mother to accept was held fatal to the adoption.

Srimati Uma Devji *v.* Gakulanund—decided last year in the Privy Council which was the case of the adoption of a remote relative, not a sapinda of the adoptive father, in disregard of the preferential claim of the son of a brother of the whole-blood (which latter could have been adopted only as a dwyamashyayana) where the Privy Council affirmed a decree of the High Court of Calcutta upholding that adoption—appears to us to be in complete accordance with the view taken by the Division Court here in Lakshmappa *v.* Ramava (12 Bom. H. C. Rep., 364), as to the right tenets to the operation of the *factum valet* maxim and not to touch the case of an imperative prohibition. A recent case in this Court, Rangabai *v.* Bhagirithibai (I. L. R., 2 Bom., 377) in which the judgment was given by our brother West, is an instance of the failure of an adoption from want of authority on the part of the giver, and the rule of *factum valet* was not applied. It was there held that a wife cannot without the assent, express or implied, of the husband, give their son in adoption. He had assented on three conditions, one of which was not fulfilled. This was ruled to be no complete assent, and therefore, the adoption was held invalid.

Adoption by Brahmins of a daughter's or sister's son is invalid, and the maxim of factum valet does not help.

In Nunkoo Sing *v.* Pirun Dhur Sing (12 W. R., 360) Dwarka Nath Mitter, J., held the adoption of a sister's son was valid, on the fact that the parties did not belong to any of the three regenerate tribes. Thus, upon the authorities and decisions, it is settled law that adoption by a Brahmin of his daughter's or sister's son is invalid, and does not fall within the limits for the application of the maxim *quod freri non dabuit factum valet.*

The text of Manu is : " He whom his father or mother gives to another as his son, provided that the donee have no issue, if the boy be of the same class and affectionately disposed, is considered as a son given, the gift being confirmed by pouring water."

Who can be adopted.

Vasishta says: " A son, formed of seminal fluids and of blood, proceeds from his father and mother as an effect from its cause. Both parents have power to sell or to desert him. But let no man give or accept an only son, since he must remain to raise up a progeny for the obsequies of ancestors. Nor let a woman give or accept a son unless with the assent of her lord. He who means to

adopt a son, must assemble his kinsmen, give humble notice to the king, and then, having made an oblation to fire with words from the Vedas in the midst of his dwelling-house, he may receive as his son by adoption, a boy nearly allied to him or (on failure of such) even one remotely allied. But if doubt arise, let him treat the remote kinsman as a sudra. The class ought to be known, for through one son the adopter rescues many ancestors." The boy to be adopted must be "the reflection of a son," as the primary object of adoption is to gratify the manes of the ancestor by the funeral cake, water, and solemn rites. In short, he is to look as much like a real son as possible. But there are the texts of Vasistha, Bandhayaya, and Caunaka: "Let no man give or accept an only son, since he must remain for the obsequies of his ancestors." "By no man having an only son is the gift of a son to be ever made." Besides there are texts of Dattaka Mimansa, Chap. IV, slokas 22, 30, 56, and Dattaka Chandrika, chap. II, sloka 25, prohibiting the adoption of a child whose age exceeds five years, or upon whom the ceremony of tonsure has been performed in the natural family. This may be annulled by the performance of the *putreshti*, or sacrifice for male issue, but the performance of the *upanayana* is an absolute bar to adoption. The performance of tonsure a second time, in the adoptive family, is sanctioned when no other person for adoption is procurable; and it is accordingly laid down that so long as this rite in the case of the three higher classes, and marriage in the case of Sudras is not performed in the family of the adopter, there is no limit of any specified time.

Adoptions in cases of Brahmins allowed before their upanayana, and of Sudras before their marriage.

And the universally-accepted opinion is, "that the period fixed for adoption with respect to the three superior tribes—Brahmins, Khatryas and Vaisyas—is prior to their investiture with their respective cords; and with respect to Sudras, prior to their contracting marriage." The prohibition against accepting an only son was elaborately considered in Manik Chunder Dutt *v.* Bhugobutty Dasi (I. L. R., 3 Cal., 443).

The plaintiff was the only son of his parents, and it was argued that being of the Sudra caste, and the adoption having been completed, the adoption was valid. Such an adoption though blameable might be made, and the sin of making it is not sufficient to make the act wholly void when it has been done. The sin is in the giver and

receiver, and the adopted son should not suffer for it. The Court (Garth, C.J., and Markby, J.,) held the adoption of an only son invalid, as the effect of such an adoption is to extinguish the lineage of the natural father, and so to deprive the ancestors of the adopted son of the means of salvation. The learned Judge (Markby, J.) observed : " I have gone carefully through all the authorities that we were referred to, and that I have discovered, and I am surprised to find how much less decisive authority there is upon the point than would appear from some of the modern text writers. Many of the decisions commonly referred to have no bearing at all upon the question ; and thus the point is referred to, but it is extremely difficult to ascertain whether it was really considered."

The earliest decision of the late Sudder Dewany Adalut usually quoted on this point is that of Ranee Bhudosini *v.* Heman Chand Sing (2 Selborne's Rep., 59), which was decided in 1839, but no question of adoption was really decided in that case at all. . . . In Rajah Sham Sheri Mull *v.* Ranee Dilraj Konwar (2 Selborne's Rep., 169,) there was, when the suit was brought, only one adoption in dispute—that of the plaintiff's father by a widow of Rajah Bheem Mull. But, on the death of the original defendant, his widow, Dilraj Konwar, adopted Tej Mull, the grandson of her husband's uncle, and continued the suit. The Zillah Court held that the adoption of the plaintiff's father was bad, not because he was an only son, which he was not, but because Rajah Bheem Mull had not authorised it ; that consequently the plaintiff had no claim to be heir of Rajah Bheem Mull ; and on this account the Zillah Judge dismissed the suit. On appeal to the Provincial Court of Benares this decree was affirmed. On further appeal to the Sudder Dewany Adalut, the pundits were asked as to the validity of both adoptions. They considered the adoption of the plaintiff's father illegal for the reason assigned ; and the adoption of Tej Mull they also declared to be illegal, he being the only son of his father, unless it could be supported as a dwyamashayayana adoption. But ultimately nothing was decided upon this point, because the Court agreed in the view that the adoption of the plaintiff's father was bad; and that, therefore, the plaintiff had failed to make out his title.

The next case is that of Nundram *v.* Kasee Pandy (3 Selborne's Rep., 232), which is dated June 30th, 1824, but

was really decided on June 30th, 1823. In that case the plaintiff claimed property which had belonged to Prellet Pandey by two titles—(1) as his heir by adoption; (2) under a deed of gift. The adoption was disputed on the ground that the plaintiff was an only son; and the gift was disputed on the ground that the property was inalienable. The Zillah Court held that both the adoption and gift were valid. This judgment was reversed on appeal by the Provincial Court, where it was held that both the adoption and the deed of gift were invalid; the adoption, upon the ground that the plaintiff was the only son; and the gift, upon the ground that the property was inalienable. A special appeal was then admitted by the Sudder Court, and the Pundits were asked whether it is allowable, according to the law current in Tirhoot, to adopt an only son. A question was asked as to the validity of the gift. The Pundits declared both the adoption and the gift to be invalid, and, after perusing this opinion, the Court dismissed the appeal.

This, it will be observed, is the earliest judicial authority upon the question in Bengal. It was necessary to determine the point because the two titles—that by gift and that by adoption—were wholly independent, and the determination was against the validity of both titles. But the litigation in this suit was subsequently reopened by an application for review, applied for on the ground that the Vyavastha, upon the strength of which the appeal was dismissed by the Sudder Dewany Adalut, had been obtained by bribery. The further report of the case is in 4 Selborne's Report p. 89 (edition 1870). The review was admitted, and fresh Pundits were consulted by the Sudder Court upon the same two points as before. The same answers were given. Upon this Mr. Smith expressed the opinion that the plaintiff ought to get a decree. He considered that he was at liberty, on the rehearing, to go into entirely new facts; and he thought it proved that the plaintiff was not an only son: he also thought that the gift was valid; and he further said that "probably" the adoption, even of an only son, was valid. But Mr. J. H. Harrington and Mr. Martin held otherwise. They thought that the question as to whether plaintiff was an only son, could not be reopened; and taking him to be so, they held that his adoption was illegal; that the gift was also illegal; and they confirmed the decision as finally passed by the Sudder Court.

Adoption of an only son invalid.

It appears, therefore, that in this case, which was twice heard, and in which the point expressly arose, four Judges against the doubtful opinion of one, held that the adoption of an only son was invalid. There could not be a stronger authority against the validity of the adoption. How it is possible that Mr. Morley could have so far misunderstood this case, as to represent it as a decision that the adoption of an only son once made could not be set aside, I cannot understand. This misstatement of this important decision has no doubt led to considerable misconception.

In Debee Dial *v.* Hur Horsing, (4 Selborne's Rep., 320,) the question was as to the validity of the adoption of the defendant. The defendant was the grandson of the paternal uncle of his adopted father and only son of his natural father. The adoption was established in the City Court of Benares, the objection that the defendant was the only son apparently not having been taken. On appeal to the Provincial Court, it was objected that the plaintiff was the only son of his father, and the Court Pundits signified their opinion that the adoption of an only son was invalid. But the respondent filed an opinion to the effect that the mother might give her son upon the special condition that he should be the son of two fathers (dwyamashyayana). The Court Pundits were thereupon again consulted, and they agreed that the adoption, as stated by the defendant, was legal. The Judge of the Provincial Court, evidently proceeding upon this view, assumed the adoption to have been in this form, and dismissed the appeal. The plaintiff then appealed to the Sudder Court. Mr. Smith (who had apparently, therefore, some reason to doubt his former opinion) admitted the appeals, and the Pundits were again consulted. They thought that the adoption could not be supported even as a dwyamushyayana, one, because the natural father had not consented to it. On the authority of this opinion Mr. Sealy and Mr. Leycester concurred in holding the adoption to be invalid, and they reversed the decree of both the lower Courts. There is no judgment given in the report, and we cannot therefore be sure what the opinion of the Judges was. It is most probable that they entirely agreed with the Pundits; but it is also just possible that they may have considered the adoption invalid, simply on the ground that the natural father's consent had not been given. I do not

therefore, reckon this as a decisive authority on this question.

In the case of Dullabh Dey *v.* Manu Bibee (5 Selborne's Rep., 50), the statement of the plaintiff was that she and her husband were asked by the defendant to give their only son to her to be adopted, but they refused. The plaintiff was, however, then pregnant, and she and her husband promised that, if she were delivered of a male child, they would give that child to the defendant. A son was born to the plaintiff, and was accordingly given to the defendant, but, owing to its tender age, was returned to its natural father. Some years afterwards, and after the child's elder brother had died, the defendant, with due solemnities, including a sacrifice for male issue, "publicly constituted him her adopted son." The Judge of the Provincial Court of Dacca, after consulting the Pundit of that Court, held the adoption valid. One of the Judges of the Sudder Court (Rattray) thought an appeal ought to be admitted upon the ground that the suit was improperly framed; but two other Judges (Ross and Turnbull) thought otherwise; and, "concurring in the facts and law as found and laid down by the lower Court," dismissed the appeal.

If it was intended in this case to lay down, as a general rule, that the adoption of an only son is valid, it is certainly very remarkable that no reference was made to the Pundits of the Sudder Court, or to the previous decisions, one at least of which is a very strong one and distinctly contrary. But Mr. Morley (Digest, p. 18) does not understand this case as deciding anything more than that "where the gift and acceptance of a second son preceded the death of an elder son given in adoption, then the full completion (*i.e.*, after the death of the elder son) is legal. It may have been thought that the gift, at the time there was an elder son living, being valid, the completion of the adoption by a performance of ceremonies was not illegal. Whether or no this would be a correct opinion, I do not say. I am disposed to think that it would not; but it seems to me more reasonable to suppose that this case was somehow distinguished, than to suppose that the previous decision in Nundram *v.* Kasee Pandy (4 Selborne's Rep., 70), which was so fully and carefully considered, was overruled.

No case bearing upon this subject in the Sudder Dewany Adawlut was produced, nor have I found any between this which was decided in 1830 and 1859. In the latter

year, a suit came up on appeal from Cuttack, in which one of the plaintiffs made title as an adopted son. But this Court and the Court below held that the plaintiff had failed to prove his adoption, and this is expressly made the ground of judgment in the Sudder Court But the Court (Trevor, Samuells, and Bayley, JJ) thought fit also to express the opinion that the plaintiff, as the only son of the adoptive father's brother, could not be adopted. If this were good law, of course, *à fortiori*, an only son could not be adopted. But it is, I believe, the first and only time that it has been held by any Court of Justice that an eldest son cannot be adopted, and the contrary has been laid in two succeeding cases—Seetaram *v.* Dhunook Dharee Sahye (1 Hay, 260) and Janokee Dabee *v.* Gopal Achayiya (I.L.R., 2 Cal., 365). I think therefore that this case also ought not to be accepted as an authority.

These are all the cases I am aware of in the late Sudder Court. In the late Supreme Court there is one case only—Joymony Dassee *v.* Sibo Sundry Dassee (4 Fulton's Rep, 75) decided in 1837. There the adoption of an only son was held valid; but the report, which is exceedingly brief, leaves it very doubtful whether the ground of the decision was not that the adoption was a dwyamashyayana : and if so, it is, of course, not in point.

There are two cases in this Court The first is that of Mussamut Tikday *v.* Hurree Lall (W. R., 1864, Gap. No. 133). I shall have to discuss that case upon another point which arises in this case. It is sufficient to say now that there the adoption was in the Kritta or Kritrima form. But a son adopted in the Kritrima form does not cease to belong to the family of his natural father.—(*See* Sutherland's in Stokes' Hindu Law, pp. 668, 669, 676, 677 and 678). The cardinal reason therefore why an only son cannot be adopted—namely, that the lineage of his family is thereby extinguished, and the ceremonies can no longer be performed, which are necessary for the salvation of his ancestors—does not apply.

There cannot be a more complete case for the application of the maxim *cessante raitione cessat et ipsa lex.* It is, I think, clear that no decision as to the validity of an adoption, where there is no extinction of lineage, can be used as an authority to support an adoption where such extinction takes place.

The other decision of this Court is that of Mr. L. S. Jackson and Mr. Justice Dwarikânath Mitra in the case of

Rajah Upendra Lal Ray *v.* Rani Prosonna Moyi (1 B. L. R., A. C., 221). Most of the authorities were considered in that case, and it was expressly held that the adoption of an only son was invalid. The suit was dismissed upon that ground; and a decision of the Madras Court to the contrary, which I am about to notice, was expressly dissented from.

In the Madras Courts there are two decisions: In Pillay *v.* Pillay 1 Strange's Notes of Madras cases (decided by Sir Thomas Strange whilst he was Recorder) the complainant, whose adoption was disputed, had an elder brother by a former marriage living at the time of the adoption. No question therefore arose in this case as to the validity of the adoption of an only son. But Sir Thomas Strange thought fit, nevertheless, to express an opinion that the adoption of an only son was valid. But as the learned Judge has elsewhere told us (Strange's Hindu Law, vol. I, p. 102), he based the decision "upon comparatively imperfect materials;" and the decision has been criticised by Sir Francis Macnaghten (see Considerations of Hindu Law, pp. 147, 187). Its chief importance depends on the relation it contains of the case of the Rajah of Tanjore (see page 107 of the report), from which it would appear that the Pundits of Bengal (including Benares) and Madras had given an opinion that the adoption of an only son was valid. But it does not appear that these opinions were ever submitted to any Court, nor is it said upon what texts they are based, and I believe it to be a clear principle understood and acted upon ever since our Courts have been established not to accept as authority the opinions of Pundits unconfirmed by judicial decision and unsupported by texts. Nor can I account for this unanimity of the Bengal Pundits in favour of the adoption of an only son. They were very frequently consulted upon this point by the Sudder Dewany Adalut and the Provincial Courts, and so far as appears from the Sudder Dewany Adalut Reports, their opinions were unanimous the other way, except in one solitary instance, that of the Court Pundit of Dacca, Mussamut Dullabh De *v.* Manu Bibi (5 Selborne's Rep., 52), and this Pundit gives no authorities.

The other case in Madras is a decision of the late Chief Justice, Sir Colley Scotland, and Frere, in Chinna Gaundan *v.* Kumara Gaundan (1 Mad. H. C., Rep., 54).

Chinna Gundan v. Kumara Gundan holding the adoption of an only son valid, commented upon.

There the adoption of an only son was distinctly held to be valid. The Chief Justice relies on the case of Pillay v. Pillay (3 Selborne's Rep., 232) just referred to, and the case of Pillay v. Pillay, which I have not been able to see; Nundram v. Kasee Pandey (3 Selborne's Rep., 232); and Joymoney Dassee v. Sibo Sundary Dassee (Fulton's Rep., 75), all of which he takes to be in favour of the validity of the adoption of an only son. I have already pointed out to what extent three of these cases are really authorities for that proposition. It is clear that the Chief Justice was misled by Morley as to the true result of the case of Nundram v. Kasee Pandey, which, as I have shewn, was directly contrary to what the learned Chief Justice supposed.

Only one case has been quoted from Bombay. It would be possible to make some observation upon that decision as it appears in the report, which is not a satisfactory one, but it is impossible to deny that the two Judges who decided it (Warden and Gibbs, JJ.) thought that the adoption, which was of an only son was legal.

It was stated in the argument that it had been held that in the Punjab generally an adoption of an only son was legal, but we have not been shewn any authority upon which that statement could be made. The only case to which we were referred does not bear out that statement. In Ajoodhia Pershad v. Mussamut Dewan (5 Punjab Record, p. 56) Simson, J., held, in special appeal, that the adoption of an only son was valid; it having been found by the lower Court on the evidence "that by the usage in Delhi generally, and in respect of the caste of the litigants in particular, the custom is to receive an only son in adoption." A former decision was referred to, which was also a case from Delhi, in which the adoption of an only son had been upheld. Lindsay, J., differed from Simson, J., but I confess I do not understand upon what grounds, for the adoption was clearly a legal one in Delhi. But the case is no authority as to the general law either of the Punjab or of any other part of India. I now pass to the text-books by English writers.

Sir Thomas Strange at vol. I., p. 87, of his Treatise on Hindu Law (London, 1800) says: "So with regard to both these prohibitions respecting an eldest and an only son, where they most strictly apply, they are directory only, and an adoption of either, however blameable in the giver,

would, nevertheless, to every legal purpose, be good, according to the maxim of the Civil Law prevailing perhaps in no Code more than in that of the Hindu's *factum valet quod freri non debuit.*" But in the Appendix, p. 107, he quotes the high authority of Mr. Colebrooke to the contrary. A Pundit had given his opinion that "if a man had no male issue of his own, it is stated, in many books, that he may, under the pressure of distress, adopt the only son of a brother. Upon this opinion Mr. Colebrooke made the following observations:—"If a brother's only son be adopted, he need not be taken away from the family of his natural father, but may continue to perform the offices of a son both to him and to his adoptive father.—*See* Notes to Mitakshara on Inheritance, chap. 1, sec. xi, 32. A valid adoption of an only son cannot otherwise be made, the absolute gift being forbidden."

A brother's only son can be adopted if not taken away from the family of his natural father.

The conclusions of Sir F. Macnaghten's Considerations of Hindu Law, p. 147 (Serampore, 1824), is thus stated: The gift of an only son in adoption is absolutely prohibited; an only son cannot be given or received in adoption. The gift of an only son is considered to be an inexpiable piacle. It is indeed said that an only son may be so given, but it might be said in the same sense that a man may perpetrate any wickedness, if he be content to forego all hopes of salvation, and be condemned to everlasting punishment." By the gift of an only son, the very deficiency which the power of adoption is intended to prevent must necessarily be occasioned." Nothing in the Hindu Law is more peremptorily interdicted than the gift of an only son in adoption. Even the gift of an eldest son is forbidden as sinful. The crime of giving an eldest has never been considered heinous as that of giving an only son. In the one case a Hindu retains, in the other he casts away, the means of salvation. Considering the precepts and injunctions, both positive and negative, upon this subject, we must be convinced that he who gives his only son in adoption is little less than apostate from the Hindu religion."

He who gives an only son in adoption is apostate from the Hindu religion.

Sir W. H. Macnaghten, in his Principles and Precedents of Hindu Law, speaking of the prohibition against adopting an only son, says at p. 67 of vol. I (Calcutta, 1829) in a note: "But this is an injunction rather against the giving than the receiving an only or elder son in adoption, and the transfer having been once made, it cannot be an-

nulled? This seems but reasonable, considering that the adoption having once been made, the boy, *ipso facto*, loses all claim to the property of his natural family." There is no doubt sometimes hardship upon the adopted son, if the adoption be held to be invalid; but he does not, as here stated in that case, lose all claim to the property of his natural father:—Bawani Sankara Pundit *v.* Ambabay Ammal (1 Mad., H. C. Rep., 363). However in vol. II, p. 179, the same author expresses a contrary, and, what I think must be considered, his final opinion. He quotes an opinion of the Pundits at p. 178 of vol. II, that a gift of the survivor of two sons is invalid. Upon this he observes in a note: "It will be observed that the answer is not directly in point. The question was, Is it legal to adopt a son under such circumstances? And the reply states, that it is illegal under such circumstances to give away a son in adoption; but in fact the prohibitory injunction applies as well to the giving as to the receiving, the giver of an only son being considered as parting not only with the sole means of evading torment himself, but as placing his ancestors in the same predicament, and as infringing, therefore, the interests of others whom the law will interpose its authority to protect."

Mr. Justice Strange, in his Manual of Hindu Law, pp. 18 and 19, contests the position that the adoption of an only son can be held valid. The passage is quoted at length in Chinna Gaundan *v.* Kumara Gaundan (1 Mad. H. C. Rep., 54). It is of little value as it puts on a par the objection to the adoption of an eldest and an only son, which shews, to say the least, a want of discrimination. Mr. Sutherland in his Synopsis (Stokes' Collection of Hindu Law Books, p. 665) says: "An only son cannot become an absolutely adopted son (Sudha Dattaka), but he may be affiliated as a dwyamushyayana or son of two fathers. In this case the reasoning of the prohibition, *viz.*, extinction of lineage to the natural father, would not apply."

It remains to notice the Hindu text writers. The earlier Hindu text writers are, of course, the source from which we ought ultimately to derive the law, and are, therefore, the most important authorities of all. But the difficulty is in ascertaining what rule it was intended to lay down. There would indeed be less difficulty if the view of Mr. Justice Dwarkanath Mittra in Upendra Lal Ray *v.*

Rani Prosonna Moyi (1 B. L. R., A. C., 221) could be accepted, that in the matter of adoption all distinctions between religious and legal injunctions are inapplicable. That distinction, however, is, in my opinion, too well established to be entirely put aside. Nor do I see that any substantial ground why that distinction should not be applied in cases of adoption as well as in other matters of Hindu Law, all of which are in a sense matters of religion. After full consideration, Mr. Justice Romesh Chandra Mittra thought it right to apply that distinction in the case of an adoption of an eldest son—Janokee Debea *v.* Gopal Archarjea (I. L.R., 2 Cal., 365), and I concurred in that view. No one disputes, however, that the authoritative text books of Hindu Law do in fact contain a prohibition against the adoption of an only son; and in order to arrive at a conclusion whether this prohibition invalidates an adoption actually made, I think we ought to consider at one view—(1) the language of the prohibition itself, (2) the authoritative commentaries upon it, and (3) the decided cases; and that we ought to see whether upon the whole the adoption is, according to modern usage, to be considered as invalid. It was indeed argued that the language of the text books themselves countenanced the view that the adoption of an only son, though blameable, was not invalid, because, whilst the giving of an only son is forbidden, the receiving him is not; whereas if the adoption were illegal, both would have been forbidden. But this is not so, as far as I have seen. It is certainly not so in the Dattaka Mimansa, the Dattaka Chandrika or the Mitakshara. The authors of these treatises all quote the same text of the Sage Vasistha, which is the foundation of the whole doctrine. This text is quoted at length in Colebrooke's Digest, vol. III., book 5, verse 273, and I need not therefore repeat it here. It clearly prohibits both the giving and receiving of an only son in adoption, and I do not find the slightest attempt to qualify this prohibition in any passage of these three writers. The first, and, as far as I am aware, the only Hindu text writer of authority who has suggested that this prohibition should be qualified, is a much more modern one, namely, Jagannatha, the author of the work popularly known as Colebrooke's Digest. He says in his note on the passage of Vasistha above-referred to (Colebrooke's Digest): "As an only son should not be given, so he should not be sold or deserted. Sale

is a great offence, even though made in a season of calamity, when maintenance cannot be provided; desertion is a great offence, because the family thereby becomes extinct. Thus the *Pracassa*: 'Let no man accept an only son, because he should not do that whereby the family of the natural father should be extinct; but this does not invalidate the adoption of such a son actually given to him.'" Opinions differ as to the precise value of Jagannatha's authority, but though, of course, it is far inferior to that of the authors of the three more ancient treatises above-referred to, it is certainly of considerable weight.

Some attempt was made to show that Sri Nath Bhatta, the author of the Dattaka Nirnaya, recognised the adoption of an only son as valid, and there is perhaps some countenance for this in the way this author is quoted by Sir F. Macnaghten at p. 126, but I should be very unwilling to draw any inference as to the opinion of any writer whose language I had not myself seen.

If this recapitulation of the authorities be carefully considered, I think it will be seen that there are four cases in which it is clear that the point properly arose and was decided. The case of Nundram *v.* Kashee Panday, in the Sudder Dewany Adalut; the case of Rajah Upendra Lal Ray *v.* Rani Prosonnamoyi (1 B. L. R., A. C., 221) in this Court; the case of Gaundan *v.* Gaundan (1 Mad. H. C. Rep., 54) in the High Court of Madras; and the case of Nimballiar *v.* Ramadin in the High Court of Bombay.

Of these the two Bengal decisions are against the adoption, the decisions of Madras and Bombay support it. Of the English text writers, Colebrooke, the two Macnaghtens, Sutherland and Mr. Justice Strange, all think the adoption illegal; there is only one English text writer, Sir Thomas Strange, on the other side, backed no doubt by the important but solitary opinion of Jagannatha amongst the Hindu text writers.

The preponderance of authority is against the validity of adoption of an only son.

It appears to me, therefore, that the vast preponderance of authority, if not the entire authority in Bengal, is against the validity of the adoption of an only son, and if we were to hold the adoption of the plaintiff in this case to be valid, it would be necessary to overrule both the carefully-considered decision of Jackson and Dwarkanath Mitter, JJ., and the equally careful decision of four Judges of the Sudder Court.

This of course could only be done by a Full Bench. But we could only refer the case to a Full Bench if there is a conflict of authority, or if we ourselves differ from these decisions. Having gone through all the cases, with great care, I do not think it can be said that there is any such conflict of authority in Bengal as to justify us in referring the case to a Full Bench on that ground; and I am not prepared to refer the case to a Full Bench upon the ground that I myself think the adoption of an only son valid. On the contrary, on the best consideration I have been able to give to the authorities, I think such an adoption ought in Bengal to be held to be invalid, wherever the effect of holding such adoption to be valid, would be to extinguish the lineage of the natural father, and so to deprive the ancestors of the adopted son of the means of salvation.

Of course the question—whether this particular case can be taken out of the general rule—is a wholly different one, and the appellant before us has contended that even if, as a general rule, the adoption of an only son be invalid, still the rule does not apply to Sudras. No reason was given for excepting Sudras from the rule, and the principle upon which the rule is based, namely, that a man shall not be allowed to extinguish his lineage to the detriment not only of himself but of his ancestors, apparently applies just as strongly to Sudras as to other Hindus. The only decided case which lends any colour to a distinction in the case of Sudras is that of Mussamut Tikday *v.* Hurree Lal (W. R., 1864, Gap. No., 133) above-referred to. But upon an examination of that case, I have come to the conclusion that it is no authority for drawing a distinction between Sudras and other classes of Hindus upon this point. No doubt the fathers in that case were Sudras; and no doubt also this fact is noticed in the judgment, but in my opinion for another purpose. The case came up upon appeal from the Zillah Court of Patna. It appeared that one Nowrunghee Lall had two wives. By the first, whose name is not given, he had a daughter, Nussibun, but no son. The second wife, Mussamut Tikday was childless. Mussamut Tikday survived her husband; the other wife died in his lifetime. During his lifetime Nowrunghee adopted his grandson, Hurree Lall, the only son of his daughter Nussibun as a Krita or Kritrima son. After Nowrunghee's death, Mussamut Tikday brought a suit against Nussibun and Huree Lall to recover as heiress to her husband certain

Sudras are equally precluded from adopting an only son.

property which had belonged to him: and it was in this suit that the question arose whether the adoption of Huree Lall was valid. In the judgment of this Court, the Zillah Judge is stated to have held that, as the family were Sudras, no exception could be taken to the selection of an only son as a Krita putro." I have referred to the judgment of the Zillah Judge, and I do not find he said this.

What he did say was that a Sudra can adopt his sister's son or daughter's son, and for this there is good authority in the Dattaka Chandrika (Stokes' Hindu Law, 632), where Sudras are specially exempted from the rule which prohibits members of the other classes from adopting a daughter's or a sister's son. But the rule as to Kritrima adoption is the same, as far as I am aware, for all the classes. It is a peculiar form of adoption which prevails in Mithila, whereby the adopted child does not cease to belong to the family of his natural father (*see* Sutherland in Stokes' Hindu Law in the passages already cited), and is not confined to any particular class. In point of fact, the Zillah Judge appears to have overlooked that this was not a regular adoption but a Kritrima one, and, urging solely upon the first opinion of Sir W. H. Macnaghten as quoted above, held that, as a general rule, the adoption of an only son could not be impeached. It was not until the case arrived in this Court that it was discovered that the adoption was in the Kritrima form, and I have no doubt that that was the substantial reason why in this case the adoption of an only son was held to be valid.

It cannot be denied that there is some ground for saying that the rules of adoption are not strictly applied to Sudras as to other of the community: one instance of relaxation has been just now mentioned; but I think we ought to be careful how we extend the text of such exceptions, and draw distinctions between the classes for which there is no direct authority in the Hindu Law. I do not find the slightest authority in any text book, for saying that there is any distinction in this respect between Sudras and the other classes. If, therefore, the distinction exists at all, it rests solely upon the language used by the Judges in the case of Mussamut Tikday *v.* Huree Lall (W. R., 1864, Gap. No. 133). But as I have just now stated, I do not think that the decision, so far as it relates to the adoption of an only son, really proceeded upon any dis-

tinction between Sudras and the other classes, and, therefore, upon the ground that this is a general rule from which it is not shewn that Sudras are excepted, I think we ought to hold that for all classes of Hindus in Bengal, an adoption is invalid wherever the effect of adoption, if valid, would be to extinguish the lineage of the natural father and to deprive the ancestors of the natural son of the means of saivation.

Thus the texts of Vasistha, Baudhayana and Shounaka: "Let no man give or accept an only son, since he must remain for the obsequies of his ancestor." "By no man having an only son is the gift of a son to be ever made" are supported by judicial decision.

The prohibition is contended by some authority to extend to the adoption of an eldest son. But the same learned Judge, Markby, J., with the full concurrence of Justice Mitter in Janokee Dabea *v.* Gopal Acharjya (I. L. R., 2 Cal., 365) has shewn that the precept is merely dissuasive and not peremptory. This decision not only disposes of the question of the adoption of an eldest son, but the questions in respect of the ceremonies necessary to be performed, and the disability of the adoptive father under certain circumstances to perform them.

The learned Judge observed: "That Dattaka Chandrika and Dattaka Mimansa are works of paramount authority on the Hindu Law of Adoption is admitted on all hands. Referring to them, we find the contention of the appellant is fully borne out. Paragraphs 29 and 30, sec. v, of Dattaka Chandrika are to the following effect:—

"29. By no man having an only son is the gift of a son to be ever made. By a man having several sons, such gift is to be anxiously made."

"30. The author, apprehending an extinction of lineage in case of the gift of a son by not even having two sons, says, 'By one having several sons.'"

On the same subject the following rules are laid down in Dattaka Mimansa, para. 1, sec. iv.: (1) Next, in reply to the question as to the qualification of the person to be affiliated, Shounaka declares: By no man having an only son (*eka putra*) is the gift of a son to be ever made. By a man having several sons (*bohu putra*), such gift is to be made on account of difficulty (*prayatnatos*). (2.) He who has one son only is eka putra or one having an

only son; by such a one the gift of that son must not be made; for a text of Vasistha declares "an only son let no man give." (3.) Since the word "gift" means the establishing another's property after the previous extinction of one's own, and another's property cannot be established without his acceptance, the author (Shounaka) implies this also in his text in question. Therefore prohibition likewise against acceptance is established by that very text. Accordingly Vasistha: "An only son let no man give or accept," &c. &c. (4.) To this he subjoins a reason "for he is (destined) to continue the line of his ancestors." His being intended for lineage being thus ordained in the gift of an only son, the offence of extinction of lineage is implied. Now this is incurred by both the giver and adopter also. For the (reason in question) is subjoined after both (verbs, *viz.*, "give and accept"). (5.) As for another text of recorded law: "In instruction, the father is absolute over a son and son's wives, but not so with respect to the son in sale and gift; and the text of the holy Saint "Except a wife and a son, other things may be given." These texts regard the case of an only son: (6.) (Even) in a time of calamity, accordingly Narada says: A deposit, a son and a wife, the whole estate of a man who has issue, living, the sages have declared, unalienable, even by a man oppressed by grievous calamities, although the property be solely that of the man himself. This text also regards an only son, for it is declaratory of the same import as the text of Shounaka and Vasistha. (7.) Next, the author replies to the question: By whom is a son to be given? "By one having several sons." "He who has several sons is bohu putra or one having several sons." (8.) "By no man having an only son." From this prohibition the gift by one having two sons being impossible.

This part of the text (by one having several sons, &c., &c.) is subjoined to prohibit the same by one having two sons also; for the speech of Santanu to Bhisma expresses: "He who has only one son, is considered by me as destitute of male issue." "The descendant of *Kuru*, one who has only one eye, is as one destitute of both; should his only eye be lost, he is absolutely blind."

From these passages it is clear that the gift and acceptance of an only son are strictly prohibited, but there is no prohibition against the gift of the eldest son. On the other hand the text, "by a man having several sons, such gift is

to be anxiously made," clearly implies the validity of the eldest out of several sons.

The only authority relied upon by the other side is to be found in paras. 11 and 12, sec. 11, chap. 1, Mitakshara, which are to the following effect :—

"(11) So an only son must not be given (nor accepted) for Vasistha ordains: 'Let no man give or accept an only son.'

"(12) Nor, though a numerous progeny exist, should an eldest son be given, for he chiefly fulfils the office of a son, as is shewn by the following text: 'By the eldest son, as soon as born, a man becomes the father of male issue.'"

Comparing these paragraphs with the rules laid down in Dattaka Chandrika and Dattaka Mimansa quoted above, we do not think that para. 12, of chap. 1, s. 11, of the Mitakshara, ought to be construed so as to render an adoption of the eldest son out of several sons invalid in law. It only repeats a doctrine well established amongst the Hindu Lawyers, that, amongst several sons of a Hindu father, the eldest born occupies the first rank. The prohibition is only admonitory, if I may so express myself, and not mandatory; that this is the correct construction of the paragraph in question is also clear from the preceding verse. There the prohibition is clear, the text quoted distinctly declaring:—"Let no man give or accept an only son." It is not so in para. 12, which, on the other hand, has a tendency to indicate that the prohibition as to the gift of the eldest son is not intended to be regarded as a legal prohibition.

Prohibition to adopt the eldest son is merely admonitory.

Only two decided cases from Bengal have been quoted before us—Seetaram *v.* Dhunnook Dharee Sahye (1 Hay's Rep., 260) and Jugbundo Ram Sing *v.* Radha Sham Narendra Mohapatter (S. D. A., 1859, p. 1556) the former supporting the contention of the appellant, and the latter taking an opposite view. For the reasons given above, we are inclined to follow the High Court ruling, which, as far as we have been able to ascertain, is fully supported by decisions of the Bombay and Madras Courts. We are therefore of opinion that the lower Court was not right in holding that the adoption of the plaintiff's husband was invalid by reason of his having been the eldest son of his natural father." The Judges decided, at the same time as

untenable, the objection that, at the time of the adoption, the plaintiff's husband was one of two sons of his natural father according to the texts of Dattaka Chandrika and Mimansa. The Bombay High Court in recent rulings in Kasibhai *v.* Tatia (I. L. R., 7 Bom., 221) and Jamnabai *v.* Ray Chand, Nahal Chand (I. L. R., 7 Bom., 226) affirmed the doctrine. Sargent, C.J., observed: "The decision in this case turns upon the question of the validity of the adoption of an eldest son. This as well as the cognate question of the validity of the adoption of an only son may probably be considered as settled in the High Courts of the other Presidencies. In Madras, the validity of the adoption of an eldest son was established in the case of Chinna Gaundan *v.* Ramesh Gaundan (1 Mad. H. C. Rep., 54). In Calcutta, the adoption of an eldest son was held valid by Mr. Justice Markby and Mr. Justice Mitter in Janokee Dabea *v.* Gopaul Acharjea (I. L R., 2 Cal., 365); and that of an only son, was held to be invalid by Sir Richard Garth, Chief Justice, and Mr. Justice Markby in Manik Chunder Dutt *v.* Bhuggobutty Dassee (I. L. R., 3 Cal, 443). In this High Court the question as to the validity of the adoption of an only son was considered by the late Chief Justice, Sir M. Westropp, at great length in an exhaustive judgment in Lakshmapa *v.* Ramava (1 Bom. H. C. Rep., 364), from which it may be gathered that although he declined, as not being necessary for the decision of the case, to give a positive opinion on the question whether a gift in adoption of an only son by his father is in this Presidency void, the inclination of his opinion was strongly against its validity. As to the adoption of an eldest son, the question does not appear to have received judicial consideration, since the cases before the Sudder Adalut referred to in the judgment of Sir M. Westropp at pp. 380, 385, and in which the answers of the Shasters and the decisions based on them, were, as might be expected, on a question of this nature, very conflicting.

We have not been referred to any text of a Smriti writer prohibiting in express terms the adoption of an eldest son, except an alleged text of Vasistha. The eldest son should not be given in adoption referred to by Haridatta in commenting on the text of Abostamba: "The gift (or acceptance of a child) and the right to sell (or buy) are not recognised." This text, it appears, is also mentioned by Anantadeva, Kasinath, Upadhyaya and Balam-

bhatta, but without referring it to any particular author (see the Vyavahava Mayukha and the Yajnavalkya Smriti by Rao Sahib Mandlik, p. 496). It is not found in three printed editions of Vasistha and one manuscript, and as the authors of the Mitakshara, Mayukha and the Dattaka Mimansa do not refer to it, although referring to the text of Vasistha which prohibits, the adoption of an only son, grave doubts must necessarily rest on its genuineness. On the other hand, the other Smriti writers, Baudhayana and Shounaka, as shewn by the texts set out in Sir M. Westropp's judgment (12 Bom., H. C. Rep., p. 377), whilst prohibiting in strong terms the adoption of an only son, are silent as to that of an eldest Passing to the commentators of the highest authority in this Presidency we find the following texts in the Mitakshara, chap. I, s. xi, para. 11 : "So an only son must not be given or (accepted) ; for Vasistha ordains : 'Let no man give or accept an only son ;'" "nor though a numerous progeny exist, should an eldest son be given ; for he chiefly fulfils the office of a son as is shewn by the following text : "By the eldest son as soon as born a man becomes the father of a male issue." The same word *anadhikar*, literally "want of authority," is used in the original in both sections, and the difference in the translation may be regarded as marking the comparative importance which Mr. Colebrooke attached to the prohibitions in the case of an only and eldest son. In the Mayukha, chap. iv, sec. v., paras. 4 and 5, the author would seem to doubt the soundness of Vyjnesvara's conclusion from the text of Manu, that the adoption of an eldest son was prohibited, but in any case he treats the prohibition as regarding the giver only. Again both the Dattaka Chandrika and Dattaka Mimansa are silent as to the adoption of an eldest son, whilst prohibiting, in express terms, that of an only son. Lastly, if we consider the reason for the prohibition in the two cases, it is plain that whilst the one is based upon the religious duty of continuing the lineage for the obsequies of ancestors, the other cannot be regarded as more than the expression of a sentimental preference for the eldest son (and that too, only, in case he happens to be the first) as being the first to make a man "the father of a male issue," for it was not attempted to be denied that the funeral ceremonies could be as effectually performed by the other sons in the event of the eldest

being given in adoption. It was contended, however, and apparently with seriousness, that "as the spiritual efficacy of the eldest son was exhausted, the adoption could be of no spiritual benefit to the adopting father."

We are unable to understand what may be meant by the expression "spiritual efficacy." The importance of having a son is, as stated by Vasistha, "that he may raise up progeny for the obsequies." Whether, therefore, we regard the texts in the Hindu books of authority in this Presidency, or the reason of such qualified prohibitions as are to be found in them, there would appear to be no sufficient ground for dealing with the prohibition of the adoption of an eldest son as more than admonitory or as creating any legal restriction.

Adoptions of Brahmins after upanayana, and of Sudras after marriage not sanctioned.

It is thus clear, beyond a doubt, than an only son cannot be adopted, and the adoption of the eldest son is not invalid, and adoptions after upanayanam of Brahmins, and after-marriage of Sudras, are not sanctioned. As regards adoption after upanayana or the investiture with the sacred cord in the case of Brahmins, the Full Bench of the Madras High Court, Turner, C.J., Kernan, and Muthusami Ayyar, JJ., in Viragrava *v.* Ramalinga (I. L. R., 9 Mad., 148) drew a distinction in its favour of such adoptions when made from the same gotra. Turner, C. J., in delivering judgment, observed: The general rule that the adoption of a Brahmin after upanayana is invalid, is not, I understand, questioned, but it is alleged that this general rule is subject to exception when the person taken in adoption is of the same gotra as the adopted, and the question, which is presented to us for decision is whether the evidence in this case is sufficient to warrant the Subordinate Judge in arriving at the conclusion that the exception is a part of the customary law of the Southern Provinces of this Presidency; while it has been ruled that "under the Hindu system clear proof of usage will outweigh the written text of the law." We have been warned that "it is the essence of special usages modifying the ordinary law . . . that they should be ancient and invariable, and that they should be established to be so by clear and unambiguous evidence."

English Judges in this country have been placed at some disadvantage in ascertaining the laws and usages accepted by the people. The treatises which have commanded the highest and most extensive authority were composed some centuries before the introduction of British

Courts. With the reference for antiquity characteristic of Hinduism, they are not, nor were they, intended to be record of law obtaining in practice, but commentaries on the text of treatises accepted as inspired. Although now and again they refer to existing practice, they do so as corroborating a subtle exposition of a text. At the same time they disclose that the law had undergone changes; that considerable variety obtained between the practice of the present and the practice of the past; and that the opinion even of the learned was still in many points unsettled. Between these principal treatises and the institution of Courts with proceedings regularly conducted and recorded, we have a long interval, during which one or other of the controverted opinions must have found more or less general acceptance. But there has been no living authority commonly recognized as decisive and coercing to uniformity. Hence local divergences of practice necessarily ensued. But while it is not impossible to detect these divergences when they can be traced to the influence of a School of Pundits which has accepted the teaching of a particular commentator, it is especially difficult to do so when the views of the commentator, locally accepted as authoritative, have been modified by practice. In a country in which property is greatly subdivided, and the written law obscure and available, but to few, many causes conduce to bring about partial donations even from such portions of the law on which educated opinion had attained more or less unanimity.

The influence of natural affection may have induced the head of the family to dispose of the family wealth otherwise than in strict conformity with the precepts of the law, and the good-feeling of the members has led them not to be too exact in vindicating their legal rights. Of this we have an instance at the present day in the very usual abstinence of Mahomedan ladies from insisting on their claim to share in their husband's estate in competition with their children. The ignorance of the local Pundits may have led here and there to an unintentional deviation from the law—and in places when the influence of the Mahomedan has for a season prevailed, the absence of an authority to constrain obedience to the personal law of the conquered, can not have been altogether without effect in unsettling the law. Lastly, there are the great changes, which changed circumstances must operate, in the legal conceptions

of the persons subject to a personal law, and which probably must have been more active than in this century.

In the case before us there is considerable evidence that, notwithstanding the ruling of the High Court, the practice of adopting Dayaids after upanayanam obtains, and seeing that no less than three Brahmin Judges, the Munsif the Subordinate Judge, and our learned colleague have pronounced in favour of the usage, I should be reluctant to hold that the Subordinate Judge was not justified in finding it sufficiently established to have the force of law. The evidence as to present practice appears to me to be supported precisely where it requires support to justify us in accepting the alleged usage as customary law. Our learned colleague has shown us that filiature is not constituted by upanayanam, but by the gift and acceptance of the youth that adoption within the gotra and caka works no necessary change on what is fixed by upanayanam, the gotra, the caka and the coma. The introductory words of the text of Vasistha "sprung from one following a different gotra" permitted the opinion that the rule which has been inferred from it applied only to those born out of the gotra. And we have been shown that this opinion was entertained by the author of the Datta Kanstabam. It is said that when one of the same gotra is adopted, the rules as to initiatory rites do not apply, and one may be adopted after upanayanam, and this author indeed goes further and maintains in reference to the instance of Somaseka in the Ramayana that adoption after upanayanam is permitted even when the youth is of a different gotra. Then we have the text of Prajapati: The acceptance of a son in adoption is good if in twelve days, middling if after tonsure, and inferior if after upanayanam. The adoption of one who is married will become a cause of destruction to the family. So also in the Smriti Sangraha we find the injunction: "Do not give one who has entered on an *assamanu* (period of life), give one who is not invested when there is no distress. In distress, give, though he is a *Brahmachari* (*i.e.*, a person who has been invested with the sacrificial thread) of a second son.

The passage in Daksha has also been brought to our notice: "A wife may give in distress a younger son, though he is a Bhahmachari, and twelve years of age, as in the case of Somaseka."

These texts are cited in Vythina, the Dikshatar, a writer of authority in the Tamil Districts, who approves of them. Here it appears to me, we have a foundation for the existence of a local custom at variance with what is now recognized as the more general rule. It may, I think, be shown that the exception had at one time more general acceptance than is now admitted.

It must always be a task of some difficulty to ascertain how far an apparent deviation from the text of the law is unintentional and how far it is due to some temporary circumstances And the difficulty is increased when the investigation must be conducted on materials supplied by suitors who have not the means to defray the cost, nor, in many cases, ability to suggest the course it should pursue. It is not, therefore, matter for surprise that in their anxiety to act on such information as appeared the more reliable, the Courts of British India should have exposed themselves to the criticism that they have guided their decisions too much by the treatises of ancient commentators and have disregarded existing usage. There has not been any unwillingness on the part of the Courts to undertake inquiries into custom, but there has been absence of material which would enable them to ascertain the existence of usage sufficiently proved to be accepted as law, and a reluctance to introduce confusion into the law, and uncertainty as to their rights among those who are governed by the law by the recognition of a deviation from the texts of the law which has been unintentional or would be explicable if the circumstances were more fully known.

I cannot admit that these considerations ought not greatly to influence the Courts, but, on the other hand, I am compelled to admit that they have in some instances been accorded somewhat too much weight, and that it is possible that, in view of fuller information, it may be necessary to modify, in some few instances, the conclusions at which the Courts have arrived. I say in some few instances, because I do not think much difference will be found to exist between the established usage and the written law on the points on which the circumstances accepted in the locality have pronounced themselves explicity.

The earliest recorded precedent under British rule, relating to their Presidency, is mentioned in Veeraperumal Pillai *v.* Narain Pillai (1 Strange's Notes of Cases, 83),

Sir Archibald Campbell, in consequence of opinions given by the Pundits of Tanjore, had placed Ameer Sing on the *musnud* of that kingdom in derogation of Serfogie (the present Rajah) claiming as an adopted son. The integrity of the opinion being suspected, there was a reference to Lord Cornwallis, who got Sir William Jones to state the substance of the questions in Sanskrit to some of the most learned Pundits in Bengal and Benares, which that eminent person took pains to do in such a manner as to render it impossible for those persons to guess who were the interested parties.

The learned Judge proceeded to say that, being actuated by similar jealousy and solicitude, he had prepared and circulated a string of questions pertinent to the points before him, and was in possession of answers from *Kasi* (Benares) to Ramesvaram from various parts of India in every direction.

One of the questions that called for decision was the limitation of age, and the learned Judge, after noticing the distinction between Brahmins and other castes, observed : "With regard to the age of five, as agreed to have been limited by the Shastra for adoption, the result of a careful perusal of all the texts in the digest and commentary was found to be consistent with, if not to confirm, the law as declared by the Pundits of the Sudder Dewany Adalut in the Tanjore case." He cited the answer of the Pundits as follows :—"That the restrictions as to purification and age are to be observed only in instances where adoption takes place of those who are not sagotras. That no *Muni* or divine legislator has positively said so, but that, in a number of books of high authority, the rule is understood to be that in case of filiation by adoption, provided the adopted be a sagotra, the adoption is valid, and the right to inheritance will attach though he have passed his fifth year and undergone the purification by tonsure." He added : "The strict interpretation of sagotra is one who has descended in a direct male line from one common ancestor."

The opinion of the Benares Pundits was also cited as follows :—"In the Central region the inhabitants adopt children who are advanced more than five years in age, and have undergone the tonsure and other modes of purification among the lineage of their natural father; and sons so adopted inherit the estates of their adoptive fathers.

"That in the Deccan, when adopting from their own lineage, if they do not find a child who has not undergone the tonsure, they take a child who has undergone it."

Sir Thomas Strange inferred from this opinion, that the limitation as to age was inapplicable not only where the person to be adopted was a sagotra, but connected with the adopter through a female. It is obvious that the terms of the translation do not necessitate this conclusion, and it is not supported by any authority which we have as yet discovered. It would appear from the rest of the judgment that Sir Thomas Strange was not at the time fully informed of the supposed reason for the rule respecting the limitation of age, and of the grounds on which it was considered inapplicable where the persons to be adopted was a sagotra.

The judgment is, nevertheless, important—although the opinions cited are those of the Pundits of Benares and of the Sudder Dewany Adalut of Bengal, it is certain that if Sir Thomas Strange had discovered any discrepancy between these opinions and the opinions he had collected from the Southern Presidency, he would not have failed to mention it.

We have then authority for the position that, as early as the commencement of this century, there was a consensus of opinion among Hindu lawyers that the rule prohibiting the adoption of a Brahmin, after the performance of tonsure or the other purificatory ceremonies, was not understood to apply in the case of an adoption by a sagotra. We have also authority for the position that, although it was admitted that this doctrine was not expressly declared by the leading authorities on the law of adoption, it was known to be declared in treatises recognised as authoritative.

The judgment to which we have referred was delivered by Sir Thomas Strange in 1803, when he filled the office of Recorder. His work on Hindu Law was published in 1830. He there recognises the grounds on which the rule respecting adoption prior to the completion of the initiatory ceremonies was founded, but he observed: "The question (of age) varied according as the adopted is taken from a family nearly related or from strangers" (Chap. IV); and, again, "that they" (the ceremonies of tonsure and upanayanam) "should so remain (to be performed) is of less consequence in proportion as the adopted is

nearly related to the adopters;" and, finally, he leaves the question, as to the eligibility of a boy for adoption after the performance of the ceremonies, an open one.

In Prayaga Venkana *v.* Lachsmi (2 Strange's Hindu Law, 102) the question was raised whether a brother's son was eligible for adoption. The Pundit replied that, according to the Dattaka Mimansa, the sons of brothers, invested with the sacrificial thread, might be adopted, and Mr. Ellis observed that the more correct because the more reasonable opinion appeared to be that a person on whom upanayanam has been performed was eligible, "if of the same gotra; ineligible, if of a different gotra from the adopter."

Persons of the same gotra on whom upanayanam has been performed are eligible for adoption; of a different gotra, ineligible.

In Sadasiva Pillai *v.* Vadaganatha Pillai (2 Strange's Hindu Law, 109) the Pundit certified that the adoption of an adult being a brother's son was valid. Mr. Colebrooke observed that a difference of opinion prevailed in regard to the adoption of adults or persons for whom certain ceremonies (*Samskora*) had been performed, the prevalent doctrine in most parts of India being adverse to it. He added: "The objections are less forcible in the instance of a relation on the male side than in the case of a stranger." Mr. Ellis considered the Pundit's opinion is correct. In Kerutnarain *v.* Mussamut Bhobensarie (1 Selborne's Report, 161), where the person adopted was apparently not a sagotra, Mr. Colebrooke observed: "In other Provinces, and even in Bengal, if the adoption be of a near relation on the paternal side, no difficulty would occur, as the adoption of a brother's son or other nearest male relative would be unquestionably valid at an age much exceeding that specified."

In Bengal the adoption of a brother's son or other nearest male relative is valid.

We can find no ruling on the point before us in the reported decisions of the Sudder Court of this Presidency. It was, however, taken in P. Venkatasaiya *v.* Venkata Charlu (1 Strange's Notes of Cases, 83), but it appears from the report that the question was imperfectly argued. No reference seems to have been made to Veeraperumal Pillai *v.* Narain Pillai (2 Strange's Hindu Law, 109), Pryaga Venkana *v.* Lachsmi (2 Strange's Hindu Law, 102), and Sadasiva Pillai *v.* Vadaganadha Pillai (2 Strange's Hindu Law, 109), nor were the learned Judges referred to the passages in the unprinted commentaries which have been collected by our colleague.

In Ramasami Iyia *v.* Bhagati (8 Madras Jurists, 151), decided by the High Court of Travancore, the Chief Justice

referring to the text from the Kalika Purana—'sons given and the rest, though sprung from the seed of another, yet being duly initialled under his own family name, become sons, &c.' (See Dattaka Mimansa, s. 4, para. 22, and to the commentary) although sprung from the seed of another; sons given and the rest when duly initialled under his 'own family name' (that is, the adopter) according to the form prescribed by his own code, under the family name of himself, 'into the different rites commencing with that for a male born, then become sons of the adoptive parent not otherwise' (para. 23, Dattaka Mimansa)—observed: In the case of a brother's son, it cannot be said that by the upanayanam already performed in the united family, he had been initiated under a family name different from that which he would have to take if he had to be adopted by the uncle or uncle's wife. The distinctive family name (tribe or gotra) would be identical, and the code or branch of the Veda which the boy and the uncle follow would be also the same, and he held the reason of the prohibition ceasing, the prohibition would not apply, and that the said prohibition is clearly directed to a case where the gotra of the adopter is different from that of the natural family of the boy adopted. For there might be cases in which adoption from a different family (gotra) may become necessary, that is, in the absence of nearer relatives, and it is to such cases clearly the case applies. The other learned Judges concurred. The Bombay High Court went further and held, in Dharma Dagu *v.* Ramkrishna Chemnaji (I. L. R., 10 Bom., 80), that the adoption of a married asagotra Brahman is not prohibited by the Hindu Law in force in the Presidency of Bombay. In it the question arose whether the plaintiff's adoption was invalid by reason of the plaintiff belonging to a different gotra from that of the adopted, and his being at the time of the adoption a married man, with children. The contention was that among Brahmins such an adoption is illegal, and the maxim *factum valet* does not help in such cases of clear illegality. The Court (Sargent, C J., and Birdwood, J.) observed: In Sadasiv Moreshwar *v.* Hori Moreshwar the question was raised but not considered as the case was decided upon another point. In Nathaji Krishnaji *v.* Huri Jagoyi (8 Bom. H. C. Rep, A. C J., 67) the Court had previously held that the adoption of a married Sudra was not invalid if he was a sagotra of the person adopting.

The High Court of Travancore held the same view.

The Bombay High Court held adoption even of a married asagotra Brahmin is not prohibited.

In that case the adoption was objected to on the strength of a passage in the Dattaka Ghandrika (sec. ii, sloka 29), which lays down that adoption must be performed previously to investiture in the case of persons of a regenerate tribe, and previously to marriage in the case of Sudras. That doctrine was affirmed as regards Brahmins by the Madras High Court in P. Venkatasaiya *v.* M. Venkata Charlu (3 Mad. H. C. Rep., 28), but was not adopted as regards Sudras in Nathaji's case (8 Bom. H. C. Rep., A. C. J., 67), in which, after referring to the passage on the subject in the Mayuka (Chap. IV, sec. v, slokas 19 and 20), and to the important decision in the Maharaj case (1 Borrodaile's Rep., 181), and to Raje Vyankatrav A. Nimbalkar *v.* Jagantrav (4 Bom. H. C. Rep., A. C. J., 191), Melvile, J., remarked that "independently of Hindu law," there was sufficient authority for holding that adoptions of married persons having families "are, in the Deccan, recognised by the custom of the country."

In Lakshmappa *v.* Ramava (12 Bom. H. C. Rep., 364), the Court held that the adoption even of an asagotra married Sudra was not invalid by Hindu law as administered in Western India, but having regard to the circumstance that in the Maharaj case (1 Borrodaile's Rep., 181) the adoption held to be valid was that of a Brahmin who was a sagotra of the adoptive mother, the Court was careful to express no opinion on the question whether the adoption of an asagotra married man of the three twice-born classes would be valid or otherwise. The judgment in Lakshmappa's case (12 Bom. H. C., Rep. 364), however, distinctly upholds the doctrine that, whether among Sudras or Brahmins, an adoption is not invalid surely because the adopted son is married, although no doubt among Brahmins, if a boy eligible in other respects can be obtained, upon whom the churakarana and upanayana ceremonies have not been performed in his natural family, "he is to be preferred for adoption to one upon whom they have been performed," it is always being understood, however, that ceremonies can be annulled if this rule is broken, and that an adoption, contrary to the rule, is not, therefore, invalid. "If marriage," observes Nanabhai Haridas, J., "because incapable of annulment, disqualifies a Sudra for adoption, it must equally, on that ground, disqualify a Brahmin for that purpose. But we fail to find it mentioned as a disqualifying cause either

by Manu, Kulluka Bhatta, Yajnavalkya, or Vijnaneshwara, or by any of the other authorities of weight in this Presidency. On the contrary, we find the Dharma Sindhu, the Sanskara Kaustabha, and the Vyavahara Mayukha distinctly recognising the adoption of a married man, the latter even going a step beyond the other two, and laying it down that a married man, who has even had a son born, may become an adopted son; and accordingly in the case of Shri Brijbhukanji Maharaj *v.* Sri Gookooloot Savji Maharaj (1 Borrodaile's Rep., 181) the adoption of a married Brahmin of the age of forty-five, and having a family, was considered a good adoption. The argument therefore based upon the assumed invalidity of a married Brahmin's adoption falls to the ground."

This exposition of the law simplifies materially the question for consideration in the present case. It is only necessary for us now to decide whether a Brahmin, who is married, and is, therefore, already a regenerate, can be translated by adoption into a new gotra, in which he can perform ceremonies which will have the effect of annulling those performed in his natural family. The answer to this question must depend on the construction to be put on the passage in the Mayukha, referred to in the judgments of this Court in the case of Nathaji Krisnaji *v.* Hari Jagoji (8 Bom. H. C. Rep., A. C. J., 67) and Lakshmappa *v.* Ramava (12 Bom. H. C. Rep., 364); for the authority of Nilkantha, especially when not opposed to Vijnaneshwara's, is supreme in this Presidency.—See Lakshmappa *v.* Romava (12 Bom. H. C. Rep., 371) and Naraysa Babaji *v.* Nana Monohar (7 Bom. H. C. Rep., A. C. J., 153). The only difficulty in dealing with the question seems to arise from the quotation by Nilakantha, with his own explanation of it, of a text from the Kalika Purana, adverse to the adoption of a son whose ceremonies up to tonsure have been performed with the gotra or family name of his father, or who is given after his fifth year. Nilkantha explains that this text "relates to those belonging to different gotras or families." But it does not, we think, follow that, because he explains the text and comments on it he therefore adopts it. No doubt in the Maharaj case (1 Borrodaile's Rep., 181) the Shastrees seem to have accepted the text, with its explanation, as a correct statement of the law. Their answer to the sixth question put to them, so far as it has a bearing on the present case, was in these terms: "It

is also stated that a boy under five years of age should be adopted, in order that he may be brought up in the religious tenets of his adoptive father. This relates to cases where no relationship subsists; but when a relation is to be adopted, no obstacle exists on account of his being of mature age, married, and having a family, provided he possess common ability and is beloved by the person who adopts him." This is clearly an amplification of the comment of Nilkantha on the text of the Kalika Purana. So far as it implies that the adoption of a boy over five years of age, who is not a relation of the adoptive father, is illegal, it seems to be opposed to the remark of Nilkantha that "much reliance is not to be placed" on the passage in Kalika Purana, which is the authority for the proposition. It is expressly stated in the Mayukha that the passage "is not to be found in two or three copies of Kalika Purana." And Rao Saheb V. N. Mandlik adds, in a note to his edition of the Mayukha, that the Sanscrit Kaustabha similarly does not recognize it as genuine. Its genuineness is not only questioned by Nilkantha, but, as remarked in Lakshmappa *v.* Ramava (1 Borrodaile 217, Ed. of 1862), has been denied by Devanda Bhatta (Dattaka Chandrika, sec. ii, 25) and "justly denied" according to "Sutherland." We hold that Nilkantha never intended to adopt the doctrine of the Kalika Purana, but that after stating and explaining the text quoted by him at the beginning of the passage in Chap. IV, sec. *v*: "According to my venerable father, even one married and the father of a male issue is fit for adoption. And this is proper since there is nothing opposed to it" (Mandlik's Vyavahara Mayukha, Translation, p. 58). There is nothing in the whole passage as we read it to restrict the application of this rule to sagotras. Nor has any text been pointed to us in the Mitakshara which modifies the rule. It appears also from Steele's Law and Customs of Hindu Castes, that the "Poona Shastrees do not recognize the necessity that adoption should precede munz and marriage." The reason given is that the passage "so interpreting the law is said by the author of the Mayukha to be an interpolation" (Steele's Law and Customs, 44). In the third edition of the Digest of Hindu Law two answers of Shastrees are referred to: In one, the adoption by a Brahmin of a boy of a different gotra, whose ceremony had been performed, was pronounced quite legal and effective. In the other, an instance of such an adoption, said to be given

in the Veda was relied on (West and Bühler, p. 1063). We must hold, therefore, that the adoption of a married asagotra Brahmin is not prohibited by the Hindu Law in force in this Presidency; though, as we observed before (relying on the judgment in Lakshmappa *v.* Ramava (12 Bom. H. C. Rep., 370), there is authority for saying that if a boy eligible in other respects can be obtained upon whom "the churakarana and upanayana ceremonies have not been performed in his natural family, he is to be preferred for adoption to one upon whom they have been performed."

In this judgment the doctrine of *factum valet* was fully and carefully considered, and it was held that an adoption, although contrary to the rule, would not on that ground be invalid. The rule is in effect directory only, and an adoption contrary to it "however blameable in the giver, would, nevertheless to evey legal purpose, be good." In Raje Vyan Katrav A. Nimbalkar *v.* Jaya Vantrav (4 Bom. H. C. Rep., A.C.J. 191), it was remarked by Gibbs, J.: That the rulings of this Court as shewn from 2 Borrodaile's Rep., p. 63, downwards, as also of the Calcutta Courts, have been that an adoption once made cannot be set aside. If the adopted be not a proper person, the sin lies on giver and receiver alone; but the adoption must stand." In Lakshmappa *v.* Ramava (12 Bom. H. C. Rep., 398) a restriction was placed on the operation of the maxim *factum valet* in cases of adoption. It was there said by Westropp, C.J.: That its application must be limited to cases in which there is neither want of authority to give or accept, nor imperative interdiction of adoption. In cases in which the Shastra is merely directory, or only points out particular persons as more eligible for adoption than others, the maxim may be usefully and properly applied if the precept or recommended preference be disregarded." This view was held in Gopal Narhar Safray *v.* Hanmant Ganesh (I. L. R., 8 Bom., 273), to be in complete accordance with Srimati Uma Debi *v.* Gokulanund Dass Mahapatra (L. R., 3 I. A., 40), in which the Privy Council upheld the adoption of a remote relative not a sapinda of the adoptive father in disregard of the preferential claim of the son of a brother of the whole blood. After referring to Sir Thomas Strange's statement that the result of all the authorities was: "That the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription, rendering invalid an adoption of one not being precisely him who, upon spiritual

consideration, ought to have been preferred," and to Sir William Macnaghten's statement. "That the injunction to adopt one's own sapinda (a brother's son is the first), and failing them to adopt out of one's own gotra, is not essential so as to invalidate the adoption in the event of a departure from the rule." Their Lordships of the Privy Council felt "that it would be highly objectionable on any but the strongest grounds to subject the natives of India in this matter to a rule more stringent than that enunciated by such text-writers as Sir William Macnaghten and Sir Thomas Strange. Their treatises have long been treated as of high authority by the Courts of India, and to overrule the propositions in question might disturb many titles." Thus there is authority of the Madras and Bombay High Courts upholding the adoption of a boy of the same gotra after the performance of the upanayanam ceremony. The Bombay High Court even holding that the adoption of a married asagotra Brahmin is not prohibited by the Hindu Law in force in the Presidency of Bombay. As regards Bengal, there is the dictum of Jaganatha in Colebrooke's Digest, *viz.*, "in other Provinces and even in Bengal, if the adoption be of a near relation on the paternal side, no difficulty would occur, as the adoption of a brother's son or other nearest male relative would be unquestionably valid at an age much exceeding that specified." But regarding the adoption of a married asagotra there is difference in opinion between the Madras and Bombay High Courts. In Nathaji Krishnaji *v.* Hari Jagaji (8 Bom. H. C. Rep., A. C., 67), the Bombay High Court held the adoption of a Sudra, who is married at the time of his adoption, is not invalid, if the adopted person be asagotra of the person adopting; and later on, in Lakshmappa *v.* Ramana (12 Bom. H. C. Rep., 364), that in Western India an adoption among Sudras is not invalid, although the person adopted was married before his adoption, nor although he may be a son of the adopter's sister and therefore not asagotra with the adopter. It was further held that among Brahmins, marriage does not disqualify for adoption, but doubt was entertained whether the adoption of an asagotra married man of any of the three regenerate tribes would be invalid.

Jaganatha, in his Digest, lays down that in Bengal the adoption of a near relation, such as a brother's son, even at an age exceeding the specified age, is valid.

The Madras High Court in Vythlinga *v.* Vijagathammal (I. L. R., 6 Mad., 47) observed, as to the validity of the adoption, the decision of this Court in the appeal of

Ayyaon as the only reported case in this Presidency which lends any colour to the opinion that, even among Sudras, the adoption of a married man would be regarded as valid under Hindu Law. It would certainly be invalid under the Dattaka Chandrika, which declares that marriage concludes the period within which a Sudra may be adopted. In Venkattachella Reddyar *v.* Moodoo Venkattachella Reddyar (2 Madras Sudder Dewany Reports, vol. I, p. 412), it was ruled that the adoption of a Sudra after marriage was illegal and void. It will be seen that the decision of the High Court in the appeal of Ayyaon did not proceed on the ground that the adoption was valid. . . . . It was allowed "on the ground that an adoption once made is valid and cannot be set aside." In it it was *inter alia* decided that marriages are allowable in the caste, which, under strict rules of Hindu Law, would be prohibited, and while it may be admitted that among Sudras the same attention is not paid to the rules as among Brahmins, we can hardly say that there is sufficient evidence to establish a custom sanctioning a marriage with a brother's daughter.

Limits within which *factum valet* applies.

In this opinion the High Courts of Allahabad and Bombay agree and have fixed the limits within which the maxim of *factum valet* should apply. It certainly does not apply to adoptions of daughter's or sister's or brother's sons among Brahmins as laid down in Bhagerathibai *v.* Radhabai (I. L. R., 3 Bom., 298), Gopal Narain Safray *v.* Hanmant Gonesh (I. L. R., 3 Bom., 273), and Baltas Kuar *v.* Lachman Sing (7 N. W. P. Rep., 117).

Jagannatha's dictum that a male only can become adopted—Vyavahara Mayukha, Chap. IV, s. 5, para. 1—was given effect to by the Bombay High Court in Gangabai *v.* Anant (I. L. R., 13 Bom., 691). The Court observed: "The point which arises in this case is one which appears to have come before the Courts now for the first time. It relates to the validity of an adoption of a daughter by a Brahmin, to place that daughter in the same legal position that his own natural daughter would have held. The plaintiff claims by virtue of the adoption to be entitled to the estate of the person who adopted her and to exclude the defendants, who are that person's next of kin, from the inheritance. The Dattaka Mimansa, sec. 7, and the Sanskara Kaustabha are quoted to us as authorities in favour of the legality of the adoption. We do not, however, consider

Daughters cannot be adopted.

that they establish the proposition for which they are cited. The adoption of a daughter appears opposed to the very purpose and history of adoption.. 'Males only need sons to relieve them from the debt due to ancestors.'—Colebrooke's Digest, Bk. V, Trans., 273, Commentary. The adoption of a daughter is not warranted by Smirite; it is supported by some Puranic instances. No instance, however, is cited to us in which the estate passed to the adopted daughter to the exclusion of other male relatives. Jaganatha denies altogether that a daughter can be adopted. We think that this latter authority is of great weight and we follow it."

Having treated of the ceremonies necessary to, and the persons who can have and take in, adoption, we shall, in the next chapter, treat of the status of the persons who adopt, of the adopted persons, their rights to inheritance, and the different kinds of adoptions.

RIGHTS OF ADOPTION.

It has been observed that adoptions by widows are always to their husbands and for their benefit. Widows cannot adopt to themselves, and any so made do not confer any right on the adopted person, either to their husband's property or even to their own property. The exceptions are adoptions under the Kritima system prevalent in Mithila and those made among dancing-girls in Madras and Western India, where adopted girls follow their adoptive mother's profession and succeed to their property.

Adopted sons are altogether transferred from their natural family.

The result then of a duly effected adoption is, that it transfers the adopted son altogether from his natural family. He ceases to offer general oblations for those of his family for whom he would have otherwise have offered them, and he loses all rights of inheritance as completely as if he had never been born. The only disabilities with regard to him in respect of his natural family are that he cannot adopt a person out of, nor can he marry in it. He inherits to his adoptive father, as also to the father, grandfather and other more distant lineal ancestors of the adoptive father, just as if he was his natural born son. This question was considered in Makunda Lall Roy *v.* Bykunt Nath Roy (I. L. R.. 6 Calc., 290), and his Lordship, Mr. Justice Prinsep, by his ruling, has finally disposed of it. The learned Judge

Mr. Justice Prinsep's ruling on the point.

observed : " The only point raised by the defendant, special appellant, before us, is that, by reason of his being an adopted and not a naturally begotten son, the plaintiff is no heir under Hindu Law, an adopted son not being recognized as a sakulya or samanadaka, nor is entitled to inherit if he be not a sapinda or related within three degrees from the common ancestor."

The general principle is very clearly laid down in the Dattaka Mimansa, sec. 6, para. 53 :—

" Without difference, relation to the father and other sires of the adopter obtains in the same manner as relation to the general family, the family duty, and family rules of that person ; the term 'son' is used without restriction in these and other passages."

Unless, therefore, we found some authority clearly restricting the rights of inheritance on the part of an adopted son, and declaring that they are something less than those of the naturally begotten son, we certainly should make no distinction between them. There is a distinction declared by Hindu Law where a naturally begotten son inherits jointly with a son previously adopted, but we can find no express authority for limiting the rights of an adopted son to inherit to the estate of one related lineally by more than three generations from the common ancestor. The point seems never to have been raised before in our Courts, but we observe that the judgment of this Court in the case of Tara Mohan Bhattacharjee *v.* Rupa Moyee Debea (9 W. R., 423) admits the rights of an adopted son to one more distantly related to him. As regards his right to succeed collaterally the following passages of the Dattaka Chandrika and Dattaka Mimansa are authorities :—

Section 3, paragraph 1, of the Dattaka Chandrika lays down : " That an adopted son cannot officiate in the sixteen funeral repasts, if the legitimate son exists." A text of Yajnavalka recites " the son-and-heir presents funeral oblations ; on failure of him, the adopted son does, as he, in every respect, resembles the real legitimate one. The son of the wife, the son given, and the rest receive the share prescribed for them by the general law."

Section 6, paragraph 53, of the Dattaka Mimansa lays down : " The adopted son, a substitute for the real legitimate son, being the agent of rites performed by a legitimate son, it follows that he is the performer of funeral repasts, the

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objects of which are the manes in honour of whom a legitimate son performs such repasts. For, without difference, relation to the father and other sons of the adopter obtains, in the same manner as relation to the general family, the sakha, the family duty and family rites of that person.' Relying on these passages, a Full Bench of the High Court, Calcutta (Sir L. S. Jackson, McDonell and Mitter, JJ.), in Puddo Kumary Debee *v.* Juggut Kissore Acharjee (I. L. R., 5 Cal., 615), held that the rights of an adopted son are in every respect similar to those of a natural born son, and he succeeds to the sapinda kinsmen of his father, and that, as regards the relationship of sapinda, there is no difference between the adopted and the natural born son. Mr. Justice Mitter, in delivering judgment, observed: "The lower Court has decided this question in favour of the plaintiffs on the authority of a gloss on a text of Manu by Kulluka Bhatta, the well-known commentator of the Institutes of Manu. The text of Manu and the gloss in question are to be found at pp. 145 and 146 of Colebrooke's Digest, Vol. III, Bk. V, chap. IV, sec. 1. Whether this gloss supports the conclusion of the lower Court is a question to which I shall revert hereafter. But it is beyond all doubt that it would not be a correct basis of decision, if the position laid down in it be found to be opposed to the authorities that are generally appealed to and govern the decision of questions of adoption arising in the Bengal School. These are the two well-known works on adoption, *viz.*, the Dattaka Chandrika by Devanda Bhatta and the Dattaka Mimansa by Nanda Pandita.

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"Then how does the question raised before us stand upon the authority of those two works of adoption? It appears abundantly clear from both these treatises that the position and status of an adopted son are precisely the same as those of a natural born son, except in a few instances which are expressly enumerated. . . .

. . . . . .

Rights of an adopted son are similar to those of a natural born son.

"From these passages, it is evident that the rights of an adopted son, unless curtailed by express texts, are in every respect similar to those of a natural born son.

"Have any texts been produced to shew that an adopted son cannot succeed to the estate of such relatives of his father as are sprung from a different family?

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"The learned advocates who argued this question before us, in support of the plaintiff's contention, have not been

able to refer us to any authority to establish this proposition.

"On the other hand, both in the Dattaka Chandrika and the Dattaka Mimansa there are passages which lead to the opposite conclusion. The author of the Dattaka Chandrika, after referring to the contradictory texts of ancient *Rishis* upon the subject of the adopted son being heir to his father's kinsmen, in sec. 5, para. 22, says: 'By reason of succeeding to the estate as sapinda kinsmen as well as to that of the father, he is (argued by the one to be) heir to kinsmen.' Then, after reconciling in the same paragraph these contradictory passages in a way which it is not necessary here to notice, in para. 24 he lays down the law thus: 'Therefore, by the same relationship of brothers and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or *other kinsmen*, where such son may not exist (the adopted son) takes the whole estate even.'

"Now, reading the two passages together, it is clear that the phrase 'other kinsmen' italicised above at least indicates the sapinda kinsmen if not others. . . .

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"The following passages from the Dattaka Chandrika and the Dattaka Mimansa will shew that, as regards sapinda relationship in the family of the adoptive father, there is no difference between a dattaka and a natural born son, (para. 32, sec. 6, Dattaka Mimansa): 'Therefore not being otherwise inferable, the relation of sapinda in the peculiar family (kula) of the adopter as founded only on express texts of law must be admitted. This is declared. Relation of sapinda is of two descriptions: through consanguinity, being obviously barred in the case of the adopted son; Hemadri (after having declared that relation, as arising alone from connection by a funeral oblation and consanguinity) has determined the relation of sapinda, of sons given and the rest, in the family of the adoptive father, as extending only to the third degree.'

"Paragraph 38.—'But, in the instance of the real legitimate son, is not thus the performance of the sapinda karana (for his father) with three forefathers only established by holy writ? Being established then by this alone, for what purpose is the inconvenience of introducing another express text to declare it?)' Anticipating this objection the author subjoins,—'Therefore this of adopted sons is a relation of sapindas, extending only to the third degree, being pro-

ductive of uncleanness and disablity of marriage, and consisting in connection by funeral oblations, &c., &c.'

"Paragraph 39.—Intending merely this it is said by the author of the Sangrah—'The relation as sapinda of adopted son extends to three degrees in the family of the natural father and like that in the family of the adopter.'

"This is a rule of law: 'The mention here of relation as sapinda in both families, is with reference to the son of two fathers; for it has been shewn that the sapinda karana for Sudra son is performed with two sets of three forefathers. Of the absolutely adopted son, the relation of sapinda in the family of the adopter consisting in connection by funeral oblation extends to three degrees; in the family of the natural father, arising only from consanguinity, it extends to seven degrees. To enlarge, would be useless.'

"Dattaka Chandrika, sec. 3, para. 16.—'In the same manner by parity of reason, where there may be a diversity of mothers, the sons of the natural mothers are first designated by a son, who is a son to two fathers at the funeral repast (suggested by the passage subjoined) in honour of the maternal grandsires of her who is the adopted mother. Where the paternal sires are honoured there certainly are the maternal.'

"Paragraph 17.—'But the absolutely adopted son presents oblations to the father and the other ancestors of his adoptive mother only; for he is capable of performing the funeral rites of that mother only; and thus, in conformity with the spirit of the sentence: 'He is (destined) to continue the line of his ancestors,' which is subjoined as the reason (in the text of Vasistha) the prohibition (therein), let not a man give an only son, refers to an adopted son other than the dwyamushyayana or son of both fathers; for (where the adopted son is such) no extinction of lineage ensues as has already been declared.'

"Paragraph 18:—'The relation as sapinda is next considered. This extends to three degrees: in the family of the natural father by reason of consanguinity, and in that of the adopter through connection by the funeral cake.'

"Paragraph 50 of sec. 6 of Dattaka Mimansa:—'The forefathers of the adoptive mother only are also the maternal grandsires of sons given, and the rest; for the rule regarding the paternal is equally applicable to the maternal grandsires (of adopted sons).'

"Paragraph 51:—'As for what is said by Hemadri that the precept enjoining the performance of a funeral repast in honour of the maternal grandfather refers to the natural maternal grandfather, that is inaccurate; for it is at variance with the passage—'of him who has given away his son, the obsequies fail.' Nor is the capacity of the maternal grandsires as givers wanting: for by reason of their affording their assent to the gift (as appears from this passage, 'having convened his kindred,' &c., &c.), they also are parties to the same. Besides by this passage 'the funeral cake follows the family and estate,' the family and estate are declared to be the cause of performing the funeral repast; and the estate of the maternal grandfather also, like that of the father, lapses from the son given. His incapacity to perform a funeral repast in honour of his original maternal grandfather is properly declared.'

"Paragraph 52:—'Accordingly Hemadri himself, from not being satisfied with that (just stated) has advanced the other position: 'In the same manner, as for the secondary father, a funeral repast must be performed in honour of the secondary maternal grandfather and the rest.'

"It is thus established that the adopted son succeeds to the sapinda kinsman of his father, and that, as regards the relationship of sapinda, there is no difference between the adopted and the natural born son.

Adopted sons succeed collaterally as well as lineally.

"It has been contended before us that verse 8 of chapter X of the Dayabhaga supports the conclusion of the lower Court, although it has not expressly referred to it. It is said that the son given is not included amongst the first six kinds of sons who are declared to be heirs of kinsmen in that verse. This contention is clearly opposed to the ruling of the Judicial Committee in Shumbhoo Chunder Chowdry *v.* Narani Debi (1 Sutherland's Privy Council cases, 25). If we are to adopt this construction, we must hold that an adopted son cannot succeed collaterally at all, a position opposed to a uniform current of decided cases upon the subject. It is true in some of these cases it has been taken for granted that the text in question of the Dayabhaga bears the construction for which the plaintiff's counsel contends. But a careful examination of the immediately preceding verse, *viz.*, verse 7, will shew that this is not the correct construction of verse 8.

"The author of the Dayabhaga deduces his conclusion

in verse 8 from Devala's text referred to in verse 7. But it is not correct to say that Devala's text places the 'son given' within the class of sons who are not heirs of kinsmen. Devala's text is not before us, and it may be that he, in reciting the twelve descriptions of sons, followed the order given in verse 7, because we find that the same text which is referred to in the Dattaka Chandrika and the Dattaka Mimansa and Colebrooke's Digest, recites the sons in the same order. But the text, after reciting them in that order, classifies them thus, *viz.*, (1) son begotten by a man himself, (2) procreated by another, (3) or received, (4) voluntarily given. After having classified them in this manner the text goes on to say: 'Among the first six are heirs of kinsmen, &c.'

"It seems to me to be reasonable to hold that the phrase 'first six' here refers to the first six according to the recital of the different descriptions of son given in an earlier portion of the text. In a note by Srikrishna Tarkalankar the order which the different descriptions of sons occupy according to the aforesaid classification is given, and it appears from it that the adopted son falls within the first six. It is evident, therefore, that, according to verse 8, the adopted son succeeds lineally as well as collaterally. This is the construction which, as already remarked, was adopted by the Judicial Committee in Shumbhoo Chunder's case (1 Sutherland's Privy Council cases, 25).

"Of the European text-writers there is a consensus of opinion that the adopted son succeeds to collateral relations of his adoptive father. They lay down this rule without any limitation. It is true that in Mr. Macnaghten's Hindu Law, p. 78, it is laid down, on the authority of the decision of the Sudder Dewanny Adawlut in the case of Gunga Mye *v.* Kissen Kissore (1 Selborne's Reports), that an adopted son does not succeed to the relatives of the adoptive mother. Whether that position is right or wrong it is not necessary to discuss in this case, but upon the point whether the adopted son succeeds to his adoptive father's relatives Mr. Macnaghten is at one with all the other European text-writers.

"The same view of the law is taken by Jagannatha in his Digest. After fully discussing this question at pp. 270 to 273 of Vol. III, he comes to the conclusion that the adopted sons are heirs to kinsmen as well as to their own adoptive fathers. It remains to notice the gloss of Kalluka Bhatta

upon the sole basis of which the decision of the lower Court upon this point rests. As I have already remarked, if it really supported the view of the lower Court, its authority could not preponderate against that of the Dattaka Chandrika and the Dattaka Mimansa. But it seems to me that it does not warrant the conclusion arrived at by the lower Court. The gloss in question which is to be found in p. 146 of Colebrooke's Digest, Vol. III, is to the following effect:—'Manu sprung from the self-existent Brahma, and first of the fourteen Manus.' Among these twelve sons of men whom he has named, the first six are pronounced kinsmen and heirs to collaterals, &c., &c.

"In the original the phrase *gotra dyada* stands for 'heirs to collaterals.' It is said that gotra dyada means heirs of the persons bearing the same family name. It may be, that this would be the meaning of the phrase above alluded to, if the letters are strictly adhered to. But it appears to me from the context that these words are intended to include all the collateral members of the family who stand in the relation of sapinda, &c., &c., to the adopted sons.

"But, granting that the literal construction should be adhered to, does the text in question support the conclusion of the lower Court? It lays down simply that the first six kinds of sons are heirs to the kinsmen sprung from the same family. It is not necessarily implied thereby that any of these six descriptions of sons is not entitled to inherit to the estate of a kinsman sprung from a different family. If that were so, the natural born son would also be debarred from inheriting the wealth of such kinsmen.

"Now, as regards decided cases, it seems to me that the precise point raised before us is not touched by any one of them. The cases of Morun Moye *v.* Bejoy Kissore (W. R., F. B., 121) and Rama Krishna *v.* Minatechi (7 Mad. H. C. Rep., 245) relate to the right of the adopted son to succeed to the estate of the relatives of the adoptive mother, which is not the question here.

In the other cases cited, the question whether the adopted son inherits to his adoptive father's relatives, who are sprung from a different family, did not arise."

Adopted sons inherit to the maternal side of their father by adoption in the same manner as a begotten son does.

The other Judges (Sir L. S. Jackson and MacDonell, J.J.) concurred in the conclusions arrived at by Mr. Justice Mitter, and held: "That, according to the true interpretation of the Hindu Law prevailing in Bengal, an adopted son

takes by inheritance from the maternal side of his father by adoption, in the same manner as a begotten son would take."

The exception is in the case of dwyamushyayana or sons of two fathers. According to the Mitakshara, it means a son begotten by one man upon the wife of another, but for and on behalf of the other. He is entitled to inherit in both families, and is bound to perform the funeral oblations of both his actual and his fictitious fathers. Their Lordships of the Judicial Committee of the Privy Council in Collector of Madura *v.* Moottoo Ramalinga Sathupathy (12 Moore's I. A., p. 397) referred to it and observed: "There is enough of positive authority to warrant the proposition that, according to the law prevalent in the Dravida country and particularly in that part of it wherein the Ramnad zemindary is situate, a Hindu widow, not having her husband's permission, may, if duly authorised by his kinsmen, adopt a son to him." And they think that that positive authority affords a foundation for the doctrine safer than any built upon speculations touching the natural development of the Hindu Law, or upon analogies, real or supposed, between adoptions according to the Dattaka form, and the obsolete practice with which that form of adoption co-existed, of raising up issue to the deceased husband by carnal intercourse with the widow. It may be admitted that the arguments founded on this supposed analogy are in some measure confirmed by passages in several of the ancient treatises above referred to, and in particular by the Dattaka Mimansa of Vidya Narain Samy, the author of the Madhuvyan, but as a ground for judicial decision these speculations are inadmissible, though as explanatory arguments, to account for an actual practice, they may be deserving of attention.

In Thakoor Jeebnath Sing *v.* The Court of Wards (15 B. L. R., 195), the Privy Council have had their attention called to this point and they observed: "That a rule of this nature is to be found amongst old collections of Hindu Law appears to be established, but there seems to be an opinion amongst the text-writers that that rule has become obsolete." In Sri Virada Pratapa Raghunada Deo *v.* Sri Brozo Kishore Patta Deo (I. L. R., 1 Mad., p. 80), their Lordships, referring to it, observe: "That to the remarks of their predecessors in the Ramnad case they adhere and desire further to observe that it is to their minds extremely

doubtful whether the supposed analogy is sufficient to support Mr. Justice Holloway's propositions in their integrity. The myth of Satyavati referred to by Narain Samy and most of the texts relating to the obsolete practice, which are to be found in Colebrooke's Digest and elsewhere, are simply an authority external to the widow as the justification of her act, an act repugnant to the general rule of asceticism and celibacy imposed upon widows. Most of the texts speak expressly of "the appointed Rinsman." By whom appointed? If we are to travel back beyond the Kali age and speculate upon what then took place, we have no reasonable grounds for supposing that a Hindu widow, desirous of raising up seed to her deceased husband, was ever at liberty to invite to her bed any sapinda, however remote, at her own discretion; and that his consent of itself constituted a sufficient authorisation of his act." Thus by the opinion of the Privy Council in the three cases referred to dwyamushyayana, *viz.*, a son begotten by one man upon the wife of another for and on behalf of that other, is obsolete. The other, which too is obsolete, is that a boy is taken from a different gotra after tonsure in his natural family. He performs ceremonies of both fathers and inherits in both families, but his son returns to his original gotra. The only sort now recognised and in respect of which the weight of authority is very strong is adoption by one brother of the son of another brother. He is considered to be the son of his uncle, and if he is the only son, the principle of the Hindu Law, that a man should not give away his only son, is maintained intact by allowing the adoption, but requiring the boy so adopted to perform the ceremonies of both fathers and allowing him to inherit to both in the absence of legitimate issue.

Dwyamushyana or adoption by one brother of the son of another brother is now recognised.

In other instances of adoption, it severs a son from his natural family. The adopted son, on being inducted into the adopting family, becomes entitled to inherit to his adoptive father, and to the father and grandfather and other more distant lineal relations of such adoptive father just as if he was his natural born son. And it has been shewn by the Full Bench ruling in Pudda Kumary Dabee *v.* Juggut Kissore Acharya (I. L. R., 5 Cal., 625) that he succeeds collaterally as well. A Full Bench of the Allahabad Court as well in Shamkuar *v.* Gaya (I. L. R., 1 All., 255) held the same view overruling Chinna Rama Krishna *v.* Minatechi (7 Mad. H. C. Rep., 245) and Morun Moye *v.*

Bejoy Kissore (W. R., F. B., 121). The Calcutta High Court (a Full Bench: Garth, C. J., Morris, Mitter and Tottenham, JJ.) on a reference by Prinsep and Norris, JJ., as well followed the dictum laid down in Pudda Kumary Dabee *v* Juggut Kissore Acharya (I. L. R., 5 Cal., 625) and in Uma Sunker *v.* Kali Komul (I. L. R., 6 Cal., 256), and decided that the adopted son had the same rights of succession *ex parte materna* as he had *ex parte paterna.* Their view was upheld by the Privy Council (see L. R., 10 I. A., 138, and I. L. R., 10 Cal., 232). The widow who adopts a son after the death of her natural born son divests herself of her estate, her united estate, as held by the Lords of the Privy Council in Vellanki Venkata Krishna *v.* Venkata Rama Laksmi (I. L. R, 1 Mad., 174) and Jamnabai *v.* Raychand Nahal Chand (I. L. R., 7 Bom., 225). Of course the son takes the estate subject to the obligation to provide a sufficient maintenance for the widow mother.

The widow after adoption divests herself of the estate and is merely entitled to sufficient maintenance.

Thus the adopted son stands exactly in the same position as if he had been born to his adoptive father, and at once becomes full heir to his property; even where there are several widows holding jointly, one, who has authority from their husband to adopt, would by adopting divest both her own estate and that of her co-widows. With it all estates which follow that of the widow such as the right of a daughter or a daughter's son. But where a legitimate son is born after an adoption, the share of their adopted son is reduced to one-fourth at most to one-third of that of the after, born son. In Bengal the adopted son takes one-third and in Madras and Bombay one-fourth of the whole estate. If there be two or more after-born sons, the shares will vary according to ratio.

In Bengal the share of the adopted son, after the birth of a legitimate son, is one-third in Madras and Bombay one-fourth.

Among Sudras the division between an after-born son and an adopted son is equal. Dattaka Mimansa explains the division to be equal only when the after-born son is destitute of good qualities. In Bengal the rule applies only to Sudras of the lower class, see Dattaka Mimansa, verse 43, Dattaka Chandrika, verse 32, 1 Strange's Hindu Law, 99, 1 W. Macnaghten, 70, and V. Darpana, p. 979. The rule of survivorship prevails in Madras, *i.e*, when the legitimate and adopted son being in joint possession, one, *viz.*, the legitimate son, dies, the adopted son takes the whole property by survivorship. In Bengal, this rule does not take effect if the legitimate son leaves a widow, daughter, daughter's son, &c., &c.

The rights which devolve on adopted sons are founded on the equitable idea that one who has been sent to seek his fortunes in another family, being deprived of the privileges in the family in which he is born, ought to inherit in his adoptive family.

But where there has been an invalid adoption, there is no change in the status of the adopted sons. But there are authorities of Katyana, Caunaka, Yajnavalka and Yajna, who, whilst forbidding the adoption of one of unequal class, admit that such adoptions do take place and are good as prolonging the line, though not for purposes of oblations. Such sons are entitled to receive maintenance. The argument is based that if a man might marry wives of different class, the sons of such wives would be legitimate and would perform their father's obsequies and inherit together. If they could do all these, it would be illogical that a man could not adopt the son of a woman he could marry. There is the text of Manu, *viz.*, "He who adopts a son without observing the rules ordained, should make him a participator of the rites of marriages, not a sharer of wealth." These texts are construed to mean that a person may be adopted under circumstances which will deprive him of his rights in one family, without entitling him to more than maintenance in the other. Mr. Mayne, in his work, refers to Sir Thomas Strange's notes on a case that, if the adoption were void, the natural rights would remain. In Bawani *v.* Ambabay (1 Mad. H. C. Rep., 363), where there was an adoption by a widow without any authority, it was held that the adoption was invalid, and no maintenance was allowed. Mr. Mayne cites the observations of Colville, C.J., in Sreemoti Rajcoomaree *v.* Nobo Kumar (1 Boulnois' Reports, 137).

"It has been said on one side and denied on the other (neither side producing either evidence or authority in support of their contention), that a dattaka or son given would forfeit the right to inherit to his natural father even though he might not for want of sufficient power have been duly adopted into the other family. This proposition seems to be contrary to reason, but for all that may be very good Hindu Law. But from the enquiries we have made, we believe the true state of the law on the subject to be this: There may undoubtedly be cases in which a person, whose adoption proves invalid, may have forfeited his right to be regarded as a member of his

natural family. In such a case some of the old texts speak of him as a slave entitled only to maintenance in the family into which he was imperfectly adopted. But one very learned person has assured me that the impossibility of returning to his natural family depends, not on the mere gift or even acceptance of a son, but in the degree in which the ceremonies of adoption have been performed; and there is a difference in this respect between Brahmins and Sudars. A Brahmin being unable to return to his natural family if he has received the Brahmanical thread in the other family; the Sudra, if not validly adopted, being able to return to his natural family at any time before his marriage into the other family. Even if it be granted that a person, merely because he is a dattaka or son given, apart from the performance of any further ceremony, becomes incapable of returning to his natural family, that rule would not govern the case of an adoption that was invalid, because the widow had not power to adopt. For to constitute a dattaka there must be both gift and acceptance. A widow cannot accept a son for her husband unless she is duly empowered to do so, and therefore her want of authority, if it invalidates the adoption, also invalidates the gift." It has already been shewn how, when there has been no authority of the husband to adopt, it could be supplied. It could only be in Southern and Western India. In the Collector of Madura *v.* Moottoo Ramalinga Sathupathy (12 Moore's I. A., p. 397, and 1 B.L.R., P. C., p. 1), the High Court of Madras observed that assent of the sapindas could give validity to an adoption made by a widow without her husband's consent. Relying on the theory that the law of adoption was founded upon the old principle of actual begetting by a brother or sapinda, they observed: "On the reason of the rule then it seems to us that if the requirement of consent is more than a moral precept, and it must not be forgotten that in all Hindu works, as in the works of all authors who expound a system of positive law, professing to be based upon divine revelation, ethical and physical notions are inextricably intermixed, the assent of any of the sapindas will suffice. If, however, the sapindas are, by a fanciful rather than a solid analogy, to be treated as a juridical person, in which the whole authority of the husband is to be vested, it would be wholly contrary to sound jurisprudence to treat

the assent of every individual member as necessary. On the contrary the will of the majority of individual members must be taken as the will of the body in any matter not manifestly repugnant to the purpose for which the body was created."

The Judicial Committee confirmed the decision, but declined to accept the analogy between adoptions according to the Dattaka form and the obsolete practice of raising up issue to the deceased husband by carnal intercourse with the widow. Their Lordships observed: "They do not think that there is any ground for saying that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think that the consent of the father-in-law to whom the law points as the natural guardian and 'venerable protector' of the widow, would be sufficient. It is not easy to lay down any inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence of the assent of kinsmen as sufficient to shew that the act is done by the widow in the proper and *bonâ-fide* performance of a religious duty, and neither capriciously nor from a corrupt motive.

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"Again it appears to their Lordships that inasmuch as the authorities in favour of the widow's power to adopt with the assent of her husband's kinsmen proceed in a great measure upon the assumption that his assent to this meritorious act is to be implied when he has not forbidden it, so the power cannot be inferred when a prohibition by the husband either has been directly expressed by him or can be reasonably deduced from his disposition of his property or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family which afford no plea for a supersession of heirs, on the ground of religious obligation to adopt a son in order to complete or fulfil defective religious rites."

Following the dictum thus laid down the cases of Virada Pratapa Raghunada Deo *v.* Brojo Kishore Patta

Deo (I. L. R., 1 Mad., 69, L. R., 3 I. A., 154, 25 W. R., 291), Vellanki Venkata Krishna Rao *v.* Venkata Rama Lakshmi (I. L. R., 1 Mad., 174, L. R., 4 I. A., 1, and 26 W. R., 21), Prasora Bhattar *v.* Rangaraja Bhattar (I. L. R., 2, Mad., 202), Gopal Shridhar Dekshit Patvardhan *v.* Nara Vinayak Dekshit Patvardhan (7 Bom., A. J., 24) were decided. The cases of Genesa Ratnamayar *v.* Gopala Ratnamayar (I. L. R., 2 Mad., 270, and L. R., 7 I. A., 173) and Venkata Lakshmamfao *v.* Navasayya (I. L. R., 8 Mad., 545), and Ramji *v.* Ghama (I. L. R., 6 Bom., 498), Dinkar Sitaram Prabhu *v.* Ganesh Shivram Prabhu (I. L. R., 6 Bom., 505) lay down adoption invalid for want of authority of the husband or consent in the part of the sapindas of the husband. The case of Girowa *v.* Bhimji (I. L. R., 9 Bom., 58) lays down that a widow, after separation from her sapindas, could adopt without their previous sanction, and without any limit as to time. A widow can adopt at any time after her husband's death—*See* Dakhina *v.* Rash Beharie (6 W. R., 221), Nimbalkar *v.* Jagavaistiav (4 Bom. H. C. Rep., A.C.J., 191) and Bhasker *v.* Narra Ragoonath Basu (1 Selborne's Rep., 24). So long as she does not act upon the authority given her to adopt, she is the sole heir of her husband on her own right and cannot be compelled to act upon it. The moment she adopts she descends from the position of sole and absolute heir of her husband, and her rights are reduced to a claim for maintenance. But some difference is made when there existed some agreement between her and the father of the boy to be adopted. In Chekto Raghunath Ragadeksh *v.* Janaki (I. L. R., 11 Bom., 199), the property, moveable and immoveable, of her husband, had vested in the widow by inheritance, and she agreed to accept a boy in adoption on an express agreement by his father that, during her lifetime, she should be entitled to such property, subject, however, to the boy's maintenance and education. It appeared that for this condition the adoption would not have taken place. It was held that the agreement was binding upon the adopted son, and his proprietory right was subject to the interest created in favour of the adoptive mother. This view is in accordance with that taken in Rangabai *v.* Bhagirithibai (I. L. R., 2 Bom., 377) and approved by the Privy Council in appeal from a decree of the Madras High Court in Ramasami Aiyan *v.* Venkatarama Aiyan (I. L. R., 2 Mad., 91, and L. R., 6 I. A., 196).

There is no limit as to time when a widow could adopt.

In Lakshmi *v.* Subramanya (I. L. R., 12 Mad., 494) the adoptive father, in taking a son in adoption, executed a settlement as to what should be done by the adopted son and his wife after his lifetime, and providing that, in the happening of an event which happened, the wife should enjoy certain lands in lieu of maintenance. In a suit by the widow against the adopted son for possession of the land it was held, it appearing that the defendant's natural father had submitted to the arrangement while giving in adoption that the defendant (the adopted son) was bound by its provisions, as the adoption and disposition of the property were one transaction. He is in all other respects as one actually begotten by the adopted father save an incapacity to contract marriages in the family from which he was taken—*See* Narasamal *v.* Bolaramacharlu (1 Mad. H. C. Rep., 420), and his adoption by the widow has a retrospective effect, but whether or no it relates back to the death of the husband is a question on which there is a difference of opinion between the Bombay and Madras High Courts—*See* Vyamkatrav Anandrav *v.* Jayavantrav Bin Matharao Ramadiv (4 Bom. H. C. Rep., A.C.J., 191), Nathaji Krishnaji *v.* Hari Jagaji (8 Bom. H. C. Rep., 67) on the one side, and Lakshmanna Rao *v.* Lakshmi Ammal (I. L. R., 4 Mad. 160) on the other.

Adoption of orphans without ceremony invalid.

The adoption of orphans, *Palak putra*, *i.e.*, a foster-child, "one who has been taken into the family of another, nurtured, educated, married, and put forward in life at his expense as if he were his son, but without the performance of an actual adoption," is not valid, although if a gift were made to him by his foster-father will not be void, nor are simultaneous adoptions, that is, adoptions made by two widows.

Simultaneous adoptions invalid

In Durga Sundari Dassee *v.* Surendra Kisav Rai (I. L. R., 12 Cal., 686) the facts were these: The testator gave by will to each of his two wives a power to adopt and gave his property to his sons, so to be adopted, but did not provide nor did he know who the adopted sons were to be. The adoption which subsequently took place was found to have been a simultaneous adoption by two widows. It was held that such an adoption was invalid, and that the persons purporting to be the adopted sons did not answer the description in the will of adopted sons, and that, therefore, there was not such a sufficient designation of their persons as to enable them to take under the will. The plaintiff

relied on the judgment of Phear, J. (in 2 Indian Jurists, N. S., 24), in the case of Monmothonath Dey *v.* Onathnath Dey, but the Court (Garth, C. J., and Wilson, J.) was of opinion that the case was distinguishable They observed: "The learned Judge in the Court below based his decision upon the authority of the case of Monmothonath Dey *v.* Onathnath Dey, but that case appears to us to be very distinguishable from the present. In that case one Promothonath Dey, having no male issue, adopted two sons, Monmothonath and Surathnath, at one and the same time, and he gave one of his sons so adopted to each of his two wives.

He afterwards made a will in favour of these two sons, whom he described in his will as his adopted sons, and he provided that, if either of them should die, the adoptive mother of that son should be at liberty to adopt another son.

A suit being brought after the testator's death to determine the rights of the parties under the will, it was held that the simultaneous adoption of the two sons was invalid, and then the question arose, whether there was such a designation of the two persons known and described as the testator's adopted sons in the will, as to enable them to take under the will though the adoption was, in fact, invalid; and it was held that there was.

They had always been considered and known as the testator's adopted sons, and therefore their description in the will was a sufficient *designatio personum* to make it clear that they were the persons whom the testator intended to benefit. Then one of these sons, Surathnath, having died, his adoptive mother, by virtue of the power contained in the will, adopted another son, Onathnath; and that adoption being valid, it was held that his description also in the will as the adopted son of the testator was sufficient to make the devise in his case valid.

There were, therefore, in this case, three instances in which the rule of *designatio personæ* properly applied; in the case of the first two devises, because they were both described and generally known as the adopted son of the testator, although their adoption was, in fact, invalid; and, in the case of the last, Onathnath, because he was actually adopted in the way provided by the will.

But, in the present case, the facts are quite different The testator had no doubt provided in his will that each

of his wives should adopt a son; and he gave his property to the sons so to be adopted, but he did not provide nor did he know who the adopted sons were to be; and therefore as the adoption which took place was invalid, the persons purporting to be adopted did not answer the description in the will of adopted sons, or, in other words, there was not a sufficient *designatio* of their persons to enable them to take under the will.

The decision, therefore, in the Indian Jurists, appears to us to be no authority in the present case. The case falls within the authority of Fanendra Deb Raikat *v.* Rajeswar Dass (I. L. R., 11 Cal., 463). There the Lords of the Privy Council laid down the rule that it is not essential to the validity of a devise or bequest that all the particulars of the subject or object of the gift should be accurate. The gift should be to a designated person, and there should be an actual giving and taking. Mere agreement between the adoptive father and the natural mother of the boy to be adopted, does not constitute a valid adoption. In Siddessory Dossee *v.* Doorga Churn Sett (2 Indian Jurists, N. S., 22), Phear, J., referring to the various authorities, deduced the following rule with the concurrence of Peacock, C.J., Trevor and Pundit, J.J.:—

Gift should be to a designated person and there should be an actual giving and taking.

"The power to adopt rests solely upon the religious necessities, so to speak, of the father, and is limited by them. It does not extend to enabling him to do more than is at the time of exercising it reasonably sufficient to satisfy the purpose for which the law exists. In other words what a reasonable man might think sufficient to ensure his happiness in a future world."